MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

February 1, 2016, through September 1, 2016

CORBIN R. DAVIS
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SUPREME COURT

November 18, 2015

Back row left to right: Justices RICHARD H. BERNSTEIN, BRIDGET M. MCCORMACK, DAVID F. VIVIANO, and JOAN L. LARSEN.

Front row left to right: Justice STEPHEN J. MARKMAN, Chief Justice ROBERT P. YOUNG, JR., and Justice BRIAN K. ZAHRA.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
STEPHEN J. MARKMAN	2021
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023
JOAN L. LARSEN	2017

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

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DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	SAMUEL R. SMITH
DON W. ATKINS	ANNE E. ALBERS
JÜRGEN O. SKOPPEK	AMY L. Van DYKE
MICHAEL S. WELLMAN	AARON J. GAUTHIER

State Court Administrator

MILTON L. MACK

Clerk: LARRY S. ROYSTER
Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2021
Judges	
DAVID H. SAWYER	2017
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
KURTIS T. WILDER	2017
PATRICK M. METER	2021
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017
COLLEEN A. O'BRIEN	2017

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021
3.	DAVID J. ALLEN	2021
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2021
	JAMES A. CALLAHAN	2017
	THOMAS CAMERON	2019
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	DAPHNE MEANS CURTIS	2021
	CHRISTOPHER D. DINGELL	2021
	CHARLENE M. ELDER	2021
	VONDA R. EVANS	2021
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2017
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	ADEL A. HARB	2019
	CYNTHIA GRAY HATHAWAY	2017
	DANA MARGARET HATHAWAY	2019
	DANIEL ARTHUR HATHAWAY	2021

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	CHARLES S. HEGARTY	2019
	CATHERINE HEISE	2019
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	EDWARD JOSEPH	2021
	CONNIE MARIE KELLEY	2021
	TIMOTHY MICHAEL KENNY	2017
	QIANA D. LILLARD	2019
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2017
	RICHARD M. SKUTT	2021
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2017
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2021
	DEBORAH A. THOMAS	2019
	MARGARET MARY VANHOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN E. BEEBE	2017
	RICHARD N. LAFLAMME	2017
	JOHN G. McBAIN, JR.	2021
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2021
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2017
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021

		Term Expires January 1 of
	CHERYL A. MATTHEWS	2017
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	DAVID A. HOORT	2017[1]
	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2017[2]
9.	PAUL J. BRIDENSTINE	2019
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	JAMES T. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2021
14.	TIMOTHY G. HICKS	2017
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2017
	ANNETTE ROSE SMEDLEY	2019
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2017

[1] To February 16, 2016.

[2] From March 17, 2016.

		Term Expires January 1 of
	MARY A. CHRZANOWSKI	2017[3]
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JAMES M. MACERONI	2021
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2017
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENENFELD	2017
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	GEORGE JAY QUIST	2017
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019[4]
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2017
	JON H. HULSING	2021
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DAVID S. SWARTZ	2021
23.	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2021

[3] To June 3, 2016.

[4] To February 19, 2016.

		Term Expires January 1 of
27.	ANTHONY A. MONTON	2019
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2017
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2017
	MICHAEL L. WEST	2019
32.	MICHAEL POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2017
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2019
	BRIAN KIRKHAM	2017
	SARAH SOULES LINCOLN	2021
	STEPHEN B. MILLER	2017
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2019
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2019
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2017
	GEORGE J. MERTZ	2021
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2021

		Term Expires January 1 of
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2019
50.	JAMES P. LAMBROS	2019
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	SCOTT LEE PAVLICH	2017
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JOHN DOUGLAS MAURER	2021[5]
	JEFFREY L. SAUTER	2021[6]
57.	CHARLES W. JOHNSON	2019

[5] From May 9, 2016.

[6] To April 30, 2016.

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019
	JAROD M. CALKINS	2021
	JACK VITALE	2017
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2017
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2017
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2021
	ROBERT T. HENTCHEL	2017
8.	ANNE E. BLATCHFORD	2019
	CHRISTOPHER HAENICKE	2019
	ROBERT C. KROPF	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2017
10.	PAUL K. BEARDSLEE	2021[1]
	SAMUEL I. DURHAM, Jr.	2017
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2019
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017

[1] From March 28, 2016.

		Term Expires January 1 of
14B.	CHARLES POPE	2021
15.	JOSEPH F. BURKE	2019
	ELIZABETH POLLARD HINES	2017
	KAREN Q. VALVO	2021[2]
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2021
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	WILLIAM C. HULTGREN	2017
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA JOHNSON	2019
23.	GENO SALOMONE	2019
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2017
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2017
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2017
31.	PAUL J. PARUK	2021[3]
	ALEXIS G. KROT	2021[4]
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2017
	DEMETRIA BRUE	2021

[2] From February 1, 2016.

[3] To June 24, 2016.

[4] From August 15, 2016.

		Term Expires January 1 of
	ESTHER LYNISE BRYANT-WEEKES	2021
	RUTH C. CARTER	2017[5]
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	WANDA EVANS	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2021
	KATHERINE HANSEN	2017[6]
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	DAVID PERKINS	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2017[7]
37.	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2017
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL III	2019

[5] To April 20, 2016.

[6] To May 8, 2016.

[7] From February 1, 2016.

		Term Expires January 1 of
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2017
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
47.	JAMES BRADY	2021
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2021
51.	RICHARD D. KUHN, JR.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2017
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2017
	MAUREEN M. MCGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2021
	HUGH B. CLARKE, JR.	2017
	FRANK J. DELUCA	2019
54B.	RICHARD D. BALL	2017
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2021
56A.	HARVEY J. HOFFMAN	2017[8]
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2021

[8] To August 1, 2016.

		Term Expires January 1 of
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2019
	CHRISTINA ELMORE	2017[9]
	JENNIFER FABER	2017
	JEANINE NEMESI LaVILLE	2019
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2017
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
67-5.	TRACY L. COLLIER-NIX	2021
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2021[10]
70-2.	ALFRED T. FRANK	2021
	KYLE HIGGS TARRANT	2019
	MANVEL TRICE, III	2021[11]

[9] From February 22, 2016.

[10] To April 30, 2016.

[11] From August 8, 2016.

		Term Expires January 1 of
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2017
	TIMOTHY J. KELLY	2019
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	PETER JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
81.	ALLEN C. YENIOR	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2017
87A.	PATRICIA A. MORSE	2021
89.	MARIA L. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	JEFFREY G. BARSTOW	2021
95B.	CHRISTOPHER S. NINOMIYA	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2017
97.	MARK A. WISTI	2021

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2018
CARL F. JARBOE	2018
THEODORE A. METRY	2018
MATTHEW R. RUMORA	2018

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2019
Bay	JOHN C. KEUVELAAR	2019
Benzie	JOHN MEAD	2019
Berrien	BRIAN BERGER	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	2021
Clare/Gladwin	MARCY A. KLAUS	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2021

Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2021
Ionia	ROBERT SYKES, JR.	2019
Iosco	CHRISTOPHER P. MARTIN	2019
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2019
Kalamazoo	G. SCOTT PIERANGELI	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	TERENCE ACKERT	2017
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	MIRIAM CAVANAUGH	2019
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2021
Macomb	CARL J. MARLINGA	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	DANIEL E. HASS	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019

Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019
Saginaw	PATRICK J. McGRAW	2019
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	DAVID DiSTEFANO	2019
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Washtenaw	JULIA OWDZIEJ	2021
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Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
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Wayne	LAWRENCE PAOLUCCI	2017
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ADMINISTRATIVE ORDER 2016-1

Authorizes the 7th Circuit Court to require parties and attorneys to submit pleadings in electronic format in personal injury or other civil cases arising from allegations of lead or other contaminants in Flint water.

Entered May 25, 2016, effective immediately (File No. 2016-7)—REPORTER.

On order of the Court, at the request of the 7th Circuit Court, and pursuant to MCR 1.109(C)(1), the 7th Circuit Court is authorized to require parties and attorneys in personal injury or other civil cases arising from allegations of lead or other contaminants in Flint water to submit pleadings in electronic format. The 7th Circuit Court shall submit a local administrative order to the State Court Administrative Office describing the manner in which such pleadings are to be submitted. This order is effective immediately, and shall remain in effect until further order of the Court.

ADMINISTRATIVE ORDER 2016-2

REGULATIONS GOVERNING A SYSTEM FOR APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CRIMINAL CASES AND MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES

Entered June 1, 2016, effective immediately (File No. 2015-27)—REPORTER.

Pursuant to the Michigan Indigent Defense Commission Act, 2013 PA 93, the Michigan Indigent Defense Commission submitted to this Court proposed standards that would regulate the manner in which counsel would be appointed to represent indigent defendants in criminal cases, and would further impose specific training, experience and continuing legal education requirements on attorneys who seek appointment as counsel in these types of cases. The Court published the proposed standards for comment, and after due consideration, conditionally approves the standards as set forth below.[1]

This approval is subject to and contingent on legislative revision of the MIDC Act to address provisions

[1] The conditional approval reflects the Court's ongoing authority to establish, implement, and impose professional standards. See Administrative Order No. 1981-7 (approving regulations and standards for the appellate indigent defense system); Administrative Order No. 2004-6 (altering the standards of AO No. 1981-7).

that the Court deems to be of uncertain constitutionality. These provisions include:

1. MCL 780.985 creates the MIDC as an "autonomous entity" and places it within "the judicial branch." Employees of the judicial branch are subject to this Court's exclusive constitutional authority to exercise general supervisory control. See Const 1963, art 6, §§ 1, 4, and 7; *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 298; 586 NW2d 635 (1998). We are concerned that placing the MIDC within the judicial branch, while denying the Court the ability to supervise and direct the commission's activities and employment, may contravene the general principle of separation of powers under the Michigan Constitution, Const 1963, art 3, § 2, and impinge upon the specific constitutional function of this Court to supervise the judicial branch.

2. MCL 780.983(f) defines "indigent criminal defense system," an entity subject to the authority of the MIDC, in a manner that includes trial courts, and combines trial courts with nonjudicial local governments. In addition, MCL 780.989(1)(a) allows the MIDC to "[d]evelop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state;" and MCL 780.989(1)(b) allows the MIDC "to assure compliance with the commission's minimum standards, rules, and procedures." We are concerned that these provisions might contain enforcement mechanisms that present an unconstitutional usurpation of this Court's authority under Const 1963, art 6, § 4, which provides that the Supreme Court "shall have general superintending

control over all courts." They also raise general separation of powers concerns under Const 1963, art 3, § 2.

3. MCL 780.989(1)(f) and (2) and MCL 780.991(2) arguably allow the MIDC to regulate the legal profession. The Constitution exclusively assigns regulation of the legal profession to the judiciary. See Const 1963, art 6, § 5; *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000); *Attorney General v Michigan Public Serv Comm*, 243 Mich App 487, 517; 625 NW2d 16 (2000).

To promote the goal of providing effective assistance of counsel for indigent defendants in criminal cases without disruption, the Court urges legislative revision of the MIDC Act to address the constitutional concerns raised herein by this Court. If this Court determines before December 31, 2016, that legislative revisions of the MIDC Act have sufficiently addressed our concerns, the standards approved conditionally by this Court today will then take full effect. Otherwise, this Court's conditional approval of these standards will be automatically withdrawn on December 31, 2016. The Court will then determine what, if any, further action it may take to preserve its constitutional authority.

The conditionally approved standards and requirements, together with the commentary of the MIDC and the MIDC's description of the principles governing the creation of the standards, are as follows:

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle

that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be

reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

Standard 2

Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court is as follows:

A. Timing and purpose of the interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need

to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow up and schedule a meeting. If confidential videoconference facilities are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pretrial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations

and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pretrial preparation, interviews, investigation, and in-court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

8. Systems without adequate settings for confidential visits for either in-custody or out-of-custody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

Standard 3

Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*,

466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel . . ." MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court is as follows:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investiga-

tion should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4

Counsel at First Appearance and Other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) . . . counsel continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d) (emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal

defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pretrial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice

process, advice on what topics to discuss with the judge, a focus on the potential for pretrial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

AMENDED ADMINISTRATIVE ORDER 2011-1

REVISION OF ADMINISTRATIVE ORDER NO. 2011-1

Entered March 23, 2016, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2011-1 is amended as follows, effective immediately.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

E-filing <u>Project</u> in the 3rd Circuit Court (Wayne County)

On order of the Court, the 3rd Circuit Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. The 3rd Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 3rd Circuit Court Electronic Document Filing Project, the 3rd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the 3rd Circuit

Court, along with other courts that participated as e-filing pilot project locations, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration. Any expenses that arise from integration of the 3rd Circuit's e-filing system with the statewide system will be the sole responsibility of the 3rd Circuit Court.

The 3rd Circuit Court will report to and provide information as requested by the State Court Administrative Office.

1.-2. [Unchanged.]

3. Participation in the Program.

(a) Participation in the project shall be mandatory in all pending "C" type cases (i.e., CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ); as well as all pending ND, NF, NI, and PZ case types. All judges in the 3rd Circuit Court's Civil Division shall participate. Expansion into the other Civil Division case types will occur as follows: upon the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: all ~~cases~~ case types for appeals (case types AA, AE, AP, AR, and AV) ~~except for the AR case type~~, all cases for administrative review, superintending control and extraordinary writs (case types AH, AL, AS, and AW), all remaining civil damage suits (NH, NI, NM, NO, NP [including asbestos cases], NS, and NZ); all criminal cases (AX, FC, FH, and FJ) and all remaining case types regarding other civil matters (PC, PD, PR, and PS).

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that

demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 3rd Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing is a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4.-15. [Unchanged.]

AMENDED ADMINISTRATIVE ORDER 2013-12

AMENDMENTS OF ADMINISTRATIVE ORDER NO. 2013-12

Entered May 25, 2016, effective September 1, 2016 (File No. 2015-17)—REPORTER.

[The present language is amended as indicated below by underlining for new text.]

Administrative Order No. 2013-12

(A) (1)-(3) [Unchanged.]

(B) (1)-(3) [Unchanged.]

Probate Court Guidelines.

[Paragraphs 1.-4. below replace former paragraphs 1.-3.:]

1. Estate Proceedings. 75% of all cases should be adjudicated within 35 days from the date of the initial filing, 90% within 182 days, and 98% within 364 days.

2. Guardianship, Conservatorship, and Protective Order Proceedings. 75% of all matters should be adjudicated within 90 days from the date of the initial filing and 95% within 364 days.

3. Mental Illness Proceedings; Judicial Admission Proceedings. 90% of all petitions should be adjudicated within 14 days from the date of filing and 98% within 28 days.

4. Civil Proceedings and Trusts Proceedings. 70% of all cases should be adjudicated within 364 days from the date of case filing and 95% within 728 days.

District Court Guidelines.

(1)-(3) [Unchanged.]

Circuit Court Guidelines.

(1)-(11) [Unchanged.]

Staff Comment: The revisions of Administrative Order No. 2013-12 adjust the time guidelines in probate courts by applying disposition rates to cases filed in estate, trust, guardianship, and conservatorship proceedings instead of applying rates to only "contested matters" in those types of proceedings. The revisions also separate the guidelines for guardianship and conservatorship proceedings from other estate matters, and group them with protective order proceedings, and group trust proceedings with civil proceedings instead of the former grouping of trusts with proceedings for estates.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

AMENDED ADMINISTRATIVE ORDER No. 2013-12

AMENDMENTS OF ADMINISTRATIVE ORDER NO. 2013-12

Entered June 15, 2016, effective September 1, 2016 (File No. 2015-17)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

(A)(1)-(3) [Unchanged.]

(B)(1)-(3) [Unchanged.]

Probate Court Guidelines.

(1)-(4) [Unchanged.]

District Court Guidelines.

(1)-(3) [Unchanged.]

Circuit Court Guidelines.

(1)-(8) [Unchanged.]

9. *Ancillary Proceedings.*

a. Guardianship, ~~and~~ Conservatorship, and Protective Order Proceedings. 75% of all ~~contested~~ matters should be adjudicated within ~~182~~90 days from the date of the initial filing and 95% within 364 days.

b. [Unchanged.]

10.-11. [Unchanged.]

Staff Comment: The revisions of the Circuit Court Guidelines reflect recent amendments in the Probate Court Guidelines.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

AMENDED ADMINISTRATIVE ORDER 2015-4

CONTINUES AUTHORIZATION TO USE THE GARNIT SYSTEM IN THE 36TH, 46TH, AND 47TH DISTRICT COURTS

Entered May 25, 2016, effective immediately (File No. 2014-10)—REPORTER.

Authorization for Use of GarnIT in the 36th, 46th, and 47th District Courts

~~On~~Until further order of the Court, effective immediately, the 36th, 46th, and 47th District Courts are each authorized to operate ~~a pilot program~~the GarnIT system for processing requests for writs of state income tax garnishment~~ through the enhanced GarnIT system~~. Participation by plaintiffs in this ~~pilot~~ program is voluntary~~ for 2015~~.

~~The courts and the State Court Administrative Office (SCAO) will track the effectiveness of the pilot programs and report the results to the Supreme Court after January 1, 2016.~~

1. Purpose and Construction.

The purpose of this ~~second pilot project is to expand the use of GarnIT to multiple courts, develop a standard procedure for adding future courts, and enhance some of the features piloted in 2014.~~ order is to authorize continued use of GarnIT in the courts that piloted the system in 2015. The 2015 pilot was successful and it is beneficial to these three courts and the

users to continue the GarnIT system while the Michigan Supreme Court determines its long-term strategy for e-filing and its plans for incorporating GarnIT into that strategy. Except for matters related to the transmission of requests and writs for state income tax garnishments through GarnIT ~~during the pilot~~, the Michigan Court Rules govern all other postjudgment proceedings concerning the cases involved in the ~~pilot~~ GarnIT program.

2. Definitions.

(a)-(j) [Unchanged.]

~~(k) "Pilot" means the court innovation initiative tested in the 36th, 46th, and 47th District Courts and the Michigan Department of Treasury in conjunction with IBM and under the supervision of SCAO. This web-based application facilitates the electronic processing of income tax garnishments in the 36th, 46th, and 47th District Courts. The pilot program is expected to launch August 20, 2015, and will continue until December 31, 2015. If it is successful, the program will be evaluated for statewide use.~~

(k)~~(l)~~ "Transaction" means the request and writ for income tax garnishment electronically processed ~~pursuant to the pilot~~.

3. Participation in GarnIT

Use of GarnIT for submitting requests for income tax garnishments in the 36th, 46th, and 47th District Courts ~~to the courts begins on August 20, 2015, and~~ shall be voluntary~~during the pilot~~.

4.-10. [Unchanged.]

11. Official Court Record; Record Retention

(a) ~~For purposes of this pilot program, t~~The electronic data and the electronic equivalent of SCAO-approved form MC 52, Request and Writ for Garnish-

ment (Income Tax Refund/Credit), produced by and through the GarnIT transaction and subsequently maintained in the case management system constitutes the official court record and meets the record retention and public access requirements of the court rules and General Records Retention and Disposal Schedule #16 — Michigan Trial Courts.

(b) A request and writ processed by GarnIT can be generated or printed on demand by the clerk. The request and writ maintained by the court will not contain the social security numbers or federal identification numbers of the parties.

(c) If a request is made for a certified copy of a request and writ processed by GarnIT, the clerk shall print the document and certify it in compliance with the Michigan Trial Court Case File Management Standards.

12. [Unchanged.]

13. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~This project will continue until further order of the Court ~~December 31, 2015~~.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted February 3, 2016, effective May 1, 2016 (File No. 2004-08)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 8.126 and Rule 9.108 of the Michigan Court Rules and of Rule 15 of the Rules Concerning the State Bar of Michigan are adopted, effective May 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court, before an administrative tribunal or agency, or in a specific arbitration proceeding in this state when associated with and on motion of an active member of

the State Bar of Michigan who appears of record in the case. An out-of-state attorney may ~~appear and~~ be temporarily admitted to practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, administrative tribunal or agency, or arbitrator and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country and who is not a member of the State Bar of Michigan.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court or administrative tribunal or agency or arbitrator an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by a current certificate of good standing issued by a jurisdiction where the out-of-state attorney is licensed and eligible to practice, the document supplied by the State Bar of Michigan showing that the required fee has been paid and an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i)-(iv) [Unchanged.]

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions~~, and a copy of the acknowledgment letter supplied by the State Bar of Michigan showing that the required fee has been paid~~. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable in-

quiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses and email addresses of both attorneys.

(b) Fee. In each case in which an out-of-state attorney seeks temporary admission in Michigan, the out-of-state attorney must pay a fee equal to the discipline and client-protection portions of a bar member's annual dues. The fee must be paid electronically to the State Bar of Michigan, in conjunction with submission of an electronic copy of the motion, the certificate of good standing and the affidavit to the State Bar of Michigan, pursuant to procedures established by the State Bar of Michigan. Upon receipt of the fee remitted electronically, confirmation of payment will issue electronically to the out-of-state attorney through the State Bar of Michigan's automated process.

~~The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission.~~ Within seven days after receipt of the copy of the motion and fee, the ~~Attorney Grievance Commission~~ State Bar of Michigan must notify the court, administrative tribunal or agency, or arbitrator and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances. The notification will be issued electronically, pursuant to the procedures established by the State Bar of Michigan. No order or other writing granting permission to appear in a case shall be entered by a court, administrative tribunal or agency, or arbitrator until the electronic notification is received from the ~~Attorney Grievance Commission~~ State Bar of Michigan.

The State Bar of Michigan shall retain the discipline portion of the fee for administration of the request for temporary admission and disciplinary oversight and allocate the client-protection portion to the Client Protection Fund. If a request for investigation is filed with the grievance administrator against an attorney while temporarily admitted to practice in Michigan, the entire amount of the administration fee paid by that attorney for the case in which the allegations of misconduct arose would be transferred to the disciplinary system.

(c) Order. Following notification by the ~~Attorney Grievance Commission~~State Bar of Michigan, if the out-of-state attorney has been granted permission to appear temporarily in fewer than 5 cases within the past 365 days, the court, administrative tribunal or agency, or arbitrator may enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order or other writing granting permission is entered, ~~the court, administrative tribunal or agency, or arbitrator~~ the Michigan attorney shall submit an electronic ~~send a~~ copy of the order or writing to the ~~Michigan attorney, the~~ out-of-state attorney, ~~and the~~ State Bar of Michigan within seven days ~~Attorney Grievance Commission~~.

~~(d) Fee. In each case in which an out-of-state attorney seeks temporary admission in Michigan, a fee equal to the discipline and client-protection portions of a bar member's annual dues must be paid. The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund. Upon receipt of payment of the fee, the State Bar of Michigan shall within three business~~

~~days send to the out-of-state attorney an acknowledgment letter that the fee has been paid.~~

~~(e)~~(d) [Relettered former paragraph (e) as (d), but otherwise unchanged.]

RULE 9.10. ATTORNEY GRIEVANCE COMMISSION.

(A)-(D) [Unchanged.]

(E) Powers and Duties. The commission has the power and duty to:

(1)-(5) [Unchanged.]

(6) submit to the Supreme Court proposed changes in these rules; and

~~(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and~~

(7)~~(8)~~ [Renumbered former paragraph (8) as (7), but otherwise unchanged.]

RULE 15. ADMISSION TO THE BAR.

Section 1. Character and Fitness Committees. [Unchanged.]

Section 2. Foreign Attorney: Temporary Permission. Any person who is duly licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, may be temporarily admitted under MCR 8.126. ~~The State Bar of Michigan shall inform the Attorney Grievance Commission when an applicant for temporary admission pays the required fee pursuant to MCR 8.126.~~

Section 3. Procedure for Admission; Oath of Office. [Unchanged.]

Staff Comment: These rule revisions combine and transfer the ministerial functions of processing the payment and monitoring the number of cases for which an out-of-state attorney is temporarily admitted in Michigan to the State Bar of Michigan. In addition, the Michigan attorney associated with the out-of-state attorney is required to submit a copy of the order granting permission to the out-of-state attorney to the state bar for purposes of monitoring.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 9, 2016, effective immediately (File No. 2013-11)—REPORTER.

On order of the Court, the Attorney Grievance Commission's proposed amendments of Rule 9.106 and Rule 9.128 of the Michigan Court Rules were published for comment at 495 Mich 1224 (2014), and an opportunity was provided for comment in writing and at a public hearing on September 24, 2014. The Attorney Grievance Commission having subsequently withdrawn its proposal, this administrative file is closed without further action.

Adopted March 9, 2016, effective immediately (File No. 2014-20)—REPORTER.

On order of the Court, the following corrections are adopted, effectively immediately.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(8) [Unchanged.]

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801~~(6)~~(5).

(10)-(11) [Unchanged.]

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A)-(C) [Unchanged.]

(D) Stay on Appeal. Stay on appeal is governed by MCR ~~7.101(H)~~7.108, 7.209, and 7.302(I). If a party appeals a trial court's denial of the party's claim of governmental immunity, the party's appeal operates as an automatic stay of any and all proceedings in the case until the issue of the party's status is finally decided.

(E)-(G) [Unchanged.]

RULE 3.002. INDIAN CHILDREN.

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.* to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from MCL 712B.3 and MCL 712B.7 shall apply.

(1)-(6) [Unchanged.]

(7) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or

second cousin, or stepparent and includes the term "relative" as that term is defined in MCL 712A.13a(1)(j).

(8)-(24) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A) Definitions. In this rule,

(1)-(3) [Unchanged.]

(4) "periodic payments" includes but is not limited to, wages, salary, commissions, bonuses, and other income paid to the defendant during the period of the writ; land contract payments; rent; and other periodic debt or contract payments. Interest payments and other payments listed in MCL ~~600.4012(4)(a)-(d)~~600.4012(14)(a)-(d) are not periodic payments.

(B)-Remainder of rule [Unchanged.]

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1)-(4) [Unchanged.]

(5) Entry of Default Judgment.

(a) [Unchanged.]

(b) Proofs for a default judgment may not be taken unless ~~the judgment fee has been deposited with the court clerk and~~ the proposed judgment has been given to the court. Nonmilitary affidavits required by law must be filed before a default judgment is entered in cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

(c)-(f) [Unchanged.]

(6)-(7) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.913. REFEREES.

(A) Assignment of Matters to Referees.

(1) [Unchanged.]

(2) Attorney and Nonattorney Referees.

(a) [Unchanged.]

(b) Child Protective Proceedings. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A) or (B), or an emergency removal hearing under MCR 3.974~~(B)~~(C). In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B).

(c)-(d) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 3.920 SERVICE OF PROCESS.

(A)-(C) [Unchanged.]

(D) Notice of Hearing

(1) [Unchanged.]

(2) Preliminary Hearing; Emergency Removal Hearing.

(a) [Unchanged.]

(b) When a child is placed outside the home, notice of the preliminary hearing or an emergency removal hearing under MCR 3.974~~(B)~~(C)(3) must be given to the parent of the child as soon as the hearing is scheduled. The notice may be in person, in writing, on the record, or by telephone.

(3)-(4) [Unchanged.]

(E)-(I) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A)-(B) [Unchanged.]

(C) Pretrial Placement.

(1) [Unchanged.]

(2) Criteria. The court may order placement of the child into foster case if the court finds all of the following:

(a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.

(b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule ~~(A)~~(a).

(c)-(e) [Unchanged.]

(3)-(8) [Unchanged.]

(D)-Remainder of rule [Unchanged.]

RULE 3.972. TRIAL.

(A)-(B) [Unchanged.]

(C) Evidentiary Matters.

(1) [Unchanged.]

(2) Child's Statement. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a~~(21)~~(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a)-(c) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.404. GUARDIANSHIP OF MINOR.

(A)-(G) [Unchanged.]

(H) Termination of Guardianship.

(1)-(4) [Unchanged.]

(5) Petition for Termination by a Party Other Than a Parent. If a petition for termination is filed by a party other than a parent or Indian custodian, the court may proceed in the manner for termination of a guardianship under section 5209 of the Estates and Protected Individuals Code, MCL 700.5209.

(6) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)-(7) [Unchanged.]

(8) The following provisions apply where a defendant seeks to challenge the plea.

(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.105~~(F)~~(G)(2).

(b)-(c) [Unchanged.]

(9) [Unchanged.]

(F)-Remainder of rule [Unchanged.]

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(H) [Unchanged.]

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under MCR 7.205~~(E)~~(F), and the Court of Appeals shall expedite the matter.

(J) [Unchanged.]

RULE 7.205 APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Emergency Appeal.

(1) [Unchanged.]

(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule ~~(D)~~(E).

(3) [Unchanged.]

(G)-(H) [Unchanged.]

[Please note that the following amendment of MCR 8.126 corrects the recent amendment of MCR 8.126 (ADM File No. 2004-08, to be effective May 1, 2016):]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court, before an administrative tribunal or agency, or in a specific arbitration proceeding in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. An out-of-state attorney may be temporarily admitted to practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, administrative tribunal or agency, or arbitrator and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country and who is not a member of the State Bar of Michigan.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court, ~~or~~ administrative tribunal or agency, or arbitrator an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by a current certificate of good standing issued by a jurisdiction where the out-of-state attorney is licensed and eligible to practice, the docu-

ment supplied by the State Bar of Michigan showing that the required fee has been paid and an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i)-(iv) [Unchanged.]

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses and email addresses of both attorneys.

(b)-(d) [Unchanged.]

RULE 9.118. REVIEW OF ORDER OF HEARING PANEL.

(A) Review of Order; Time.

(1)-(2) [Unchanged.]

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205~~(F)~~(G). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted.

(B)-(F) [Unchanged.]

RULE 9.224. REVIEW BY SUPREME COURT.

(A)-(E) [Unchanged.]

(F) Submission. The clerk will place the case on a session calendar under MCR ~~7.312~~7.313. Oral argument may be requested.

Code of Judicial Conduct. Canon 3.

Code of Judicial Conduct

Canon 3

A Judge Should Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A.-B. [Unchanged.]

C. Disqualification:

A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003~~(B)~~(C).

D. ~~Remittal~~ Waiver of Disqualification.

A disqualification of a judge may be ~~remitted~~waived as provided by MCR 2.003~~(D)~~(E).

Staff Comment: These amendments update cross-references that changed after the rule was adopted and make other nonsubstantive revisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 23, 2016, effective May 1, 2016 (File No. 2014-09)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions. Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(3)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

RULE 7.212. BRIEFS.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(6) [Unchanged.]

(7) The arguments, each portion of which must be prefaced by the principal point stated in capital letters or boldface type. As to each issue, the argument must include a statement of the applicable standard or standards of review and supporting authorities, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions. Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court. Page

references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means. If determination of the issues presented requires the study of a constitution, statute, ordinance, administrative rule, court rule, rule of evidence, judgment, order, written instrument, or document, or relevant part thereof, this material must be reproduced in the brief or in an addendum to the brief. If an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presentence report to the court at the time the brief is filed;

(8)-(9) [Unchanged.]

(D)-(I) [Unchanged.]

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication shall be deemed "unpublished."

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule;

(3) alters, ~~or~~ modifies, or reverses an existing rule of law ~~or extends it to a new factual context~~;

(4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a ~~recently~~ reported decision since November 1, 1990;

(5) involves a legal issue of significant~~continuing~~ public interest;

(6) criticizes existing law; or

(7) ~~creates or~~ resolves a ~~an apparent~~ conflict among unpublished Court of Appeals opinions brought to the Court's attention~~of authority, whether or not the earlier opinion was reported~~; or

(8) [Unchanged.]

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) [Unchanged.]

(D)-(J) [Unchanged.]

Staff Comment: An unpublished opinion may be cited, for example, if there is no published authority on a given legal proposition or if it is necessary to demonstrate a conflict in interpretation of the law. The changes in MCR 2.119 and MCR 7.212 provide cross-references to MCR 7.215(C).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective September 1, 2016 (File No. 2014-27)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.305 of the Michigan Court Rules is adopted, effective September 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.305. SUBPOENA FOR TAKING DEPOSITION.

(A) General Provisions.

(1) Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.

(2)-(5) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 2.305 clarifies that subpoenas requesting the production of documents shall be issued only after defendant has had reasonable time after the complaint is filed and served to obtain an attorney, as described in MCR 2.306(A)(1).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective September 1, 2016 (File No. 2014-04)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 2.306 of the Michigan Court Rules are adopted, effective September 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION.

(A)-(B) [Unchanged.]

(C) Conduct of Deposition; Examination and Cross-Examination; Manner of Recording; Objections; ~~Conferring~~ Communicating with Deponent.

(1)-(4) [Unchanged.]

(5) ~~Conferring~~ Communicating with Deponent.

(a) A person may instruct a deponent not to answer only when necessary to preserve a privilege or other legal protection, to enforce a limitation ordered by the court, or to present a motion under MCR 2.306(D)(1).

(b) A deponent may not ~~confer~~ communicate with another person while a question is pending, except to decide whether to assert a privilege or other legal protection.

(c) For purposes of this rule, "communicate" includes electronic communication conducted by text message, email or other transmission using an electronic device.

(D)-(G) [Unchanged.]

Staff Comment: The amendments of MCR 2.306(C)(5) and (C)(5)(b) replace references to the word "conferring" or "confer" with "communicating" or "communicate." The amendment of MCR 2.306(C)(5)(c) clarifies that the term "communicate" includes electronic transmission by text message, email or other electronic manner.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective September 1, 2016 (File No. 2015-12)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules are adopted, effective September 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.605. COLLECTION OF PENALTIES, FINES, FORFEITURES, AND FORFEITED RECOGNIZANCES.

(A)-(C) [Unchanged.]

(D) Remission of Penalty. An application for the remission of a penalty, including a bond forfeiture, may be made to the judge who imposed the penalty or ordered the forfeiture. The application may not be heard until reasonable notice has been given to the prosecuting attorney (or municipal attorney) and he or she has had an opportunity to examine the matter and prepare to resist the application. The application may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless waived by the court.

(E) [Unchanged.]

RULE 3.606. CONTEMPTS OUTSIDE IMMEDIATE PRESENCE OF COURT.

(A)-(E) [Unchanged.]

(F) The court shall not sentence a person to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3). Proceedings to which the Child Support and Parenting Time Enforcement Act, MCL 552.602 *et seq*., applies are subject to the requirements of that act.

RULE 3.928. CONTEMPT OF COURT.

(A)-(C) [Unchanged.]

(D) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

RULE 3.944. PROBATION VIOLATION.

(A)-(E) [Unchanged.]

(F) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the

nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

RULE 3.956. REVIEW HEARINGS; PROBATION VIOLATION.

(A)-(B) [Unchanged.]

(C) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1)-(2) [Unchanged.]

(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to

comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.

(b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.

(c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:

(i) Defendant's employment status and history.

(ii) Defendant's employability and earning ability.

(iii) The willfulness of the defendant's failure to pay.

(iv) Defendant's financial resources.

(v) Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

(vi) Any other special circumstances that may have bearing on the defendant's ability to pay.

(F)-(G) [Unchanged.]

RULE 6.445. PROBATION REVOCATION.

(A)-(F) [Unchanged.]

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court

may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court without ~~and~~ having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) [Unchanged.]

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).

~~(2)~~(3) [Renumbered, but otherwise unchanged.]

~~(3)~~(4) [Renumbered, but otherwise unchanged.]

(G)-(H) [Unchanged.]

RULE 6.933. JUVENILE PROBATION REVOCATION.

(A)-(D) [Unchanged.]

(E) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Staff Comment: The amendments of MCR 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 were submitted by the Michigan State Planning Body for the Delivery of Legal Services to the Poor. The rule revisions are intended to provide clarity and guidance to courts regarding what courts would be required to do before incarcerating a defendant for failure to pay.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective January 1, 2017 (File No. 2016-06)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.925, 8.119, and 8.302 of the Michigan Court Rules and new Rule 5.133 of the Michigan Court Rules are adopted, effective January 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT ~~FILES~~ RECORDS; SETTING ASIDE ADJUDICATIONS.

(A)-(C) [Unchanged.]

(D) Public Access to Case File Records; Confidential File.

(1) General. Case file ~~R~~records ~~of the juvenile cases~~ maintained under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.*, other than confidential files, must be open to the general public.

(2) Confidential Files. Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order. Only persons who are found by the court to have a legitimate interest may be allowed access to the confidential files. In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.

(E) Retention and Destruction of Court ~~Case Files and Other Court~~ Records. ~~This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).~~

~~(1) Destruction Generally; Effect.~~ The court ~~may~~ shall destroy its case files and other court records only as prescribed by ~~this rule and~~ the ~~approved General Records Retention and Disposal Schedule #16 — Michigan Trial Courts~~records retention and disposal schedule established under MCR 8.119(K). Destruction of a case record ~~file~~ does not negate, rescind, or set aside an adjudication.

~~(2) Register of Actions, Indexes, and Orders. The register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; the order of adjudication and the order terminating jurisdiction for each delinquency case; the latest dispositive order for each designated case; and the order appointing a guardian for each juvenile guardianship case.~~

~~(3) Delinquency and Motor Vehicle Code Case Files.~~

~~(a) Except as provided in subrule (2), the court may destroy the diversion case file of a juvenile after the juvenile becomes 17 years of age.~~

~~(b) Except as provided in subrule (2), the court may destroy all case files of matters heard on the consent calendar after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the consent calendar and a~~

register of actions exists, the register of actions must be maintained permanently as a nonpublic record.

(c) Except as provided by subrules (2), (3)(a), and (3)(b), the court may destroy the legal records in the case files pertaining to a person's juvenile offenses when the person becomes 30 years of age. The social records in the case files pertaining to a person's juvenile offenses may be destroyed three years after entry of the order terminating jurisdiction of that person or when the person becomes 18 years old, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(3). The court must destroy the records in traffic and local ordinance case files opened by issuance of a citation pursuant to the motor vehicle code or a local corresponding ordinance when the person becomes 30 years of age.

(d) If the court destroys its case files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.

(4) Child Protective Case Files. Except as provided in subrule (2), the court may destroy the legal records in the child protective proceeding case files pertaining to a child, 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminating jurisdiction of that child or when the child

~~becomes 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(3).~~

~~(5) Personal Protection Proceeding Case Files. The court may destroy the legal and social records in personal protection proceeding case files pertaining to a juvenile respondent three years after the expiration date of the personal protection order or the latest dispositive order on a violation of the personal protection order, or when the juvenile respondent becomes 18 years of age, whichever is later.~~

~~(6) Juvenile Guardianship Case Files. Except as provided in subrule (2), the court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian.~~

~~(7) Probation Case Files. The court may destroy the records in probation case files pertaining to a juvenile three years after an order terminating jurisdiction or when the juvenile becomes 18 years of age, whichever is later.~~

(F)-(G) [Unchanged.]

RULE 5.133. OPENING WILLS ORIGINALLY FILED FOR SAFEKEEPING.

If a will filed for safekeeping under MCL 700.2515 remains unopened 100 years after the date it was filed with a court, the will shall be opened by the probate register and maintained in accordance with MCR 8.302. Upon opening, the will shall be considered a will delivered after the death of the testator and shall be retained for the period prescribed in the record retention and disposal schedule established under MCR 8.119(K).

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) [Unchanged.]

(B) Records Standards. The clerk of the court shall comply with the records standards in this rule, MCR 1.109, and as ~~otherwise~~ prescribed by the Michigan Supreme Court.

(C) Filing of Documents and Other Materials. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Documents and other materials filed with the court as defined in MCR 2.107(G) must comply with Michigan Court Rules and the Michigan ~~Supreme Court records~~Trial Court Case File Management S~~s~~tandards. The clerk of the court may only reject documents that do not meet the following minimum filing requirements:

(1)-(5) [Unchanged.]

(D) Records Kept by the Clerk of the Court. The clerk of the court shall ~~keep~~maintain the following case records in accordance with the Michigan ~~Supreme~~ Trial Court Case File Management Standards, Michigan Trial Court r~~R~~ecords Retention and Disposal Standards and Guidelines, ~~standards~~ and approved records retention and disposal schedules~~local court plans~~. Documents and other materials made confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to subrule (I) that makes a document or other materials in that case confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) ~~Indexes~~ Case History and Case Files. ~~Except for civil infractions, t~~The clerk shall ~~keep and~~ maintain records of each case consisting of case history~~a numerical index, an alphabetical index, a~~ (known as a register

of actions)~~,~~ and, except for civil infractions, a case file in such form and style as may be prescribed by the ~~Supreme Court~~State Court Administrative Office. Each case shall be assigned a case number on receipt of a complaint, petition, or other initiating document. The case number shall comply with MCR 2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under ~~the Juvenile Code~~Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.*, as required under MCR 5.113(A)(1)(b)(ii). The case number (and petition number if applicable) shall be recorded in the court's automated case management system and on the~~ register of actions~~, case file~~, numerical index, and alphabetical index~~. The records shall include the following characteristics:

~~(a) Numerical Index. The clerk shall maintain a numerical index as a list of consecutive case numbers on which the date of filing and the names of the parties are recorded. The index may be maintained either as a central index for all cases filed in the court or as separate lists for particular types of cases or particular divisions of the court.~~

~~(b) Alphabetical Index. The clerk shall maintain a central alphabetical index or separate alphabetical indexes for particular types of cases or particular divisions of the court on which the date of filing, names of all parties, and the case number are recorded.~~

(~~c~~a) ~~Register of Actions~~Case History. The clerk shall ~~keep~~create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party

name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of the parties, and names of any attorneys of record. The ~~register of actions~~ case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Case File Management Standards. ~~When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:~~

~~(i) the offense (if one);~~

~~(ii) the judge assigned to the case;~~

~~(iii) the fees paid;~~

~~(iv) the date and title of each filed item;~~

~~(v) the date process was issued and returned, as well as the date of service;~~

~~(vi) the date of each event and type and result of action;~~

~~(vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;~~

~~(viii) the orders, judgments, and verdicts;~~

~~(ix) the judge at adjudication and disposition;~~

~~(x) the date of adjudication and disposition; and~~

~~(xi) the manner of adjudication and disposition.~~

Each ~~notation~~entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each ~~nota-~~

~~tion~~entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(~~d~~b) Case File. The clerk of the court shall maintain a ~~paper and/or electronic~~ file ~~for~~of each action, bearing the case number assigned to it, ~~in which the clerk shall keep~~for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any~~. Additionally, the clerk shall keep in the file all~~ other materials prescribed by court rule, statute, or ~~as~~ court order~~ed by the court~~ to be filed with the clerk of the court. If ~~other~~ case file records ~~of a case file~~ are maintained separately from the case files, the clerk shall ~~keep~~ maintain them as prescribed by the Michigan Trial Court Case File Management Standards~~trial court case file management standards~~.

(2) Calendars. The clerk may maintain calendars of actions. A calendar is a schedule of cases ready for court action that identifies times and places of activity.

(3) Abolished Records.

(a) Journals. Except for recording marriages, journals shall not be maintained.

(b) Dockets. A register of actions replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered in the court's automated case management system~~on the register of actions~~.

(E) Other Case Records. The clerk or other persons designated by the chief judge of the court shall ~~keep~~ maintain in the manner prescribed by these rules, other materials filed with or handled by the court for purposes of case processing, including but not limited to wills filed for safekeeping, case evaluations, exhibit logs, presentence reports, probation files, problem-

solving court treatment files, financial statements for collections, and friend of the court records.

(F)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk may not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information ~~in a register of actions~~ through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case ~~records~~files may be provided through electronic means only upon request. The court may provide access to any case record that is not ~~a document~~available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(C)(2), in a medium ~~in~~for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Unchanged.]

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders

pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5)-(7) [Unchanged.]

(J) [Unchanged.]

(K) Retention Periods and Disposal of Court Records. For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be ~~destroyed~~disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before ~~destroying~~disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such ~~by State Archives~~ in the Michigan trial courts approved records retention and disposal schedule. An order ~~of destruction~~disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, ~~and~~ Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5.

(L) [Unchanged.]

RULE 8.302. ~~DOCUMENTS AND FILES~~RECORDS AND ENTRIES KEPT BY CLERK.

~~Original orders and letters of authority, after being recorded, must be placed in the files of the court. For~~

~~security purposes, testamentary documents of deceased persons, bonds, orders, and such other documents as the court directs must be copied by microfilming or other means promptly after filing or issuance and preserved in the records of the court separately from the files. In addition, t~~The clerk of every probate court shall maintain court records and make reports as prescribed by MCR 8.119. In addition, any unsealed testamentary document filed with the probate court must be safeguarded by reproducing the document in a format authorized by the Records Reproduction Act (MCL 24.401 *et seq.*) and maintaining it in accordance with the Michigan Trial Court Case File Management Standards.

Staff Comment: The amendments of MCR 3.925, 8.119, and 8.302 and the adoption of MCR 5.133 are an expected progression in the development of policies and procedures that standardize management of court records and provide a uniform basis for developing parameters on the use of technology in creating, accessing, routing, maintaining, and disposing of court records. These particular amendments will assist in implementing the goals of 2013 PA 199 and 201 and improving the policies and procedures adopted by the Court in 2012 under Administrative File No. 2006-47.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective September 1, 2016 (File No. 2015-05)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.979 of the Michigan Court Rules is adopted, effective September 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted]

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A)-(B) [Unchanged.]

(C) Court Jurisdiction; Review Hearings; Lawyer-Guardian ad Litem.

(1) Jurisdiction.

(a) Except as otherwise provided in this rule, the~~The~~ court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. ~~Upon notice by the Department of Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardian assistance.~~

(b) Unless terminated by court order, the court's jurisdiction over a juvenile guardianship ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday. Upon notice by the Department of Health and Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the

court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance.

(2)-(3) [Unchanged.]

(D) Court Responsibilities.

(1) Annual Reviews.

(a) Review on Condition of Child. The court shall conduct an annual review of a juvenile guardianship ~~annually~~ as to the condition of the child until the child's eighteenth birthday. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary. If the report ~~of~~ by the juvenile guardian has not been filed as required by subrule (E)(1), the court shall take appropriate action.

(b) Review on Extended Guardianship Assistance. If, under subrule (C)(1)(b), the Department of Health and Human Services has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing at least once every 12 months thereafter ~~the youth's eighteenth birthday~~ to determine that the guardianship meets the criteria under MCL 400.667. The duty to conduct an annual review hearing on extended guardianship assistance shall discontinue when the youth is no longer eligible for extended guardianship assistance. Notice of the hearing under this subrule shall be sent to the guardian and the youth as provided in MCR 3.920(D)(1).

(i) The hearing conducted under this subrule may be adjourned up to 28 days for good cause shown.

(ii) If requested by the court, the guardian must provide proof at the review hearing that the youth is in compliance with the criteria of MCL 400.667.

(iii) Following a review hearing under this subrule, ~~The~~the court shall issue an order to support its determination and serve the order on the Department of Health and Human Services, the guardian, and the youth.

(c) Termination of Juvenile Guardianship. Upon receipt of notice from the Department of Health and Human Services that it will not continue guardianship assistance, the court shall immediately terminate the juvenile guardianship.

(2)-(4) [Unchanged.]

(E)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 3.979 requires a court to maintain jurisdiction over a juvenile guardianship for 120 days after the juvenile's 18th birthday in cases where DHHS is making an eligibility determination for extended guardianship assistance. The revisions of MCR 3.979 also reflect recent amendments of the Young Adult Voluntary Foster Care Act (MCL 400.669) and the Juvenile Code (MCL 712A.2a).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective September 1, 2016 (File No. 2014-17)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 7.306 of the Michigan Court Rules are adopted, effective September 1, 2016.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A) [Unchanged.]

(B) What to File. To initiate an original proceeding, a plaintiff must file with the clerk

(1)-(2) [Unchanged.]

(3) proof that a copy of the complaint and brief was served on the defendant, and, for a complaint filed against the Attorney Discipline Board or Attorney Grievance Commission, on the respondent in the underlying discipline matter; and

(4) [Unchanged.]

Copies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint.

(C) [Unchanged.]

(D) Brief by Respondent in Action Against Attorney Grievance Commission or Attorney Discipline Board. A respondent in an action against the Attorney Grievance Commission or Attorney Discipline Board may file a response brief with the clerk within 21 days after service of the complaint, and a proof that a copy of the response brief was served on plaintiff and defendant. A response brief filed under this subsection shall conform with MCR 7.212(B) and (D).

(E)-(I) [Former (D)-(H) relettered, but otherwise unchanged.]

Staff Comment: The amendments of MCR 7.306 expressly authorize a respondent attorney to file a brief in actions of superintending control when the complainant objects to a dismissal by the AGC or ADB; the amendments also require the party filing for superintending control to

serve copies of the complaint and brief on the respondent and allow 21 days for respondent attorney to submit a brief, with copies to be served on the plaintiff and defendant.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 25, 2016, effective immediately (File No. 2014-13)—REPORTER.

On order of the Court, the proposed amendment of Rule 2.403 of the Michigan Court Rules having been published for comment at 498 Mich 1208 (Part 4, 2015), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

AMENDMENT OF RULES FOR THE BOARD OF LAW EXAMINERS

Adopted May 25, 2016, effective August 1, 2016 (File No. 2015-23)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 6. FEES.

The fees are: an application for examination, $400~~$340~~ and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for reexamination, $300~~$240~~; an application for recertification, $300~~$200~~; an application for admission without examination, $800~~$600~~ plus the requisite fee for the National Conference of Bar Examiners' character report. Certified checks or money orders must be payable to the State of Michigan. Online bar examination payments for first time exam takers must be paid by credit card.

Staff Comment: The amendment of BLE Rule 6 increases the fees for application for the bar examination from $340 to $400, reexamination from $240 to $300, application for recertification from $200 to $300, and application for admission without examination from $600 to $800.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

MICHAEL F. CAVANAGH

PRESENTATION OF THE PORTRAIT OF THE HONORABLE MICHAEL F. CAVANAGH

MAY 18, 2016

CHIEF JUSTICE ROBERT P. YOUNG, JR.: Good afternoon. Welcome to this special session of the Court where we will unveil and dedicate the portrait of our former colleague and Michigan's longest-serving appellate jurist, MICHAEL F. CAVANAGH. The carbon dating that the Michigan Historical Society performed suggests that he served just about a millennium. I have also waited 18 years to properly hang him. [Laughter.]

I believe we have among us some other former justices. Not only do we have former Justice ARCHER, who will be speaking, we have, I think, CHARLES LEVIN is here and both KELLYs. Former Justices MARILYN KELLY and MARY BETH KELLY are here.

Seeing Mike this afternoon reminded me of how much my colleagues and I appreciated his wit and his warmth in conference. But seeing his family and friends reminds me of something much more important—that being on the bench was only a part of Mike CAVANAGH because more than anything, he is a father, husband, brother, uncle, grandpa, and dear friend to many. In particular, we welcome, with our sincere condolences, Mike's wife, Patricia; son, Mike, Jr.; daughters, Megan and Jane; and the entire Cavanagh clan.

And certainly, in Michigan, the name Cavanagh is synonymous with public service—especially in a black

robe. In fact, the person who gave Mike his first job serving the public I believe is here today. And it's he who we should blame. In 1967, Gil Wanger hired Mike to be Lansing's assistant city attorney. And as a Republican who served as a delegate to Michigan's Constitutional Convention, Gil took much grief for hiring a Democrat in his office. And one of life's great ironies is that Gil ultimately lost to Mike in a race for district court judge in 1972. But, ever magnanimous, Gil doesn't regret the hiring. He said, "I was glad I did," as Gil says today, "because Mike did a good job." Mike kept doing a good job for 50 years—or nearly so—first as that assistant city attorney, a district judge, and then a judge on the Court of Appeals and on the Supreme Court.

Not long before he retired, Mike spoke at a ceremony of graduates at the University of Detroit Mercy Law School who were renewing their Lawyer's Oath. He talked about how much the world had changed since he first took the oath in—what was it, nineteen-diggity-doo? [Laughter.] In 1966. But what was more important, he said, was not what had changed, but what had not changed. And, to quote him: "Principles, courage in the face of adversity, love of family and friends, love of God, compassion for your fellow man, decency, honor, and the strength and commitment to stand your ground when it would be so easy to succumb."

That commitment to stand his ground is what I remember most about Mike during the 16 years that we served together on the Court. So I was not surprised to learn recently that Mike authored more dissenting opinions than any other justice in Michigan history. He wrote 277. That dissent statistic does great things to my heart. And I feel proud to have contributed to helping Mike achieve that dissenting distinction. [Laughter.]

Supreme Court Justice Ruth Bader Ginsburg very aptly described what it feels like to be in dissent. She said, "I'm dejected, but only momentarily, when I can't get the fifth vote for something I think is very important. But then you go on to the next challenge and you give it your all. You know that these important issues are not going to go away. They are going to come back again and again. There'll be another time, another day." That's what Mike did so well and for so long. He gave it his all. Now, that is the conclusion of my extraneous remarks, and I am moderately honored to introduce my colleague, Justice MCCORMACK. [Laughter.] She looks innocent, but she's not, and she's a biter. [Laughter.] I have the healing scars to prove it. Justice MCCORMACK served for Mike's last two years on the Court, but they developed a special bond. In fact, I recall Mike saying on several occasions that the years he was happiest on the Court were the last two. That seemed a bit of a snub, but one learns to live with those things. [Laughter.] Mike was the most senior and Bridget the most junior. And for my part, I note that Mike wasn't the only justice happy to have Justice MCCORMACK on this bench. Her dynamic approach and sparkling intellect made our conference discussions more challenging and entertaining. So I have very high expectations for her remarks this afternoon. They will make us both think and laugh. Justice MCCORMACK.

JUSTICE BRIDGET M. MCCORMACK: Wow, thank you very much for that introduction. As you know, I tell my kids that low expectations are the key to life, so you just kind of made it hard. But thank you very much for the opportunity to speak today to my colleagues, to all the Cavanaghs, to all the friends of Mike, and especially to Mike. I'm really honored that I have this opportunity.

I didn't personally meet Mike CAVANAGH until the very end of 2012, unless you count appearing before him in this courtroom, which I had done, as early as a decade before. I don't know if he remembers that. But in December of 2012, shortly after I was elected and shortly before the Chief swore me in, I drove to Lansing to have lunch with Mike. And then we spent most of the next two years in daily contact, because that's the job, and because, well, lucky me to have that opportunity. I'm so grateful that as a brand new justice, I had, in the senior member of my Court, this big-hearted, humble, patient, gentle, hilarious professional to show me the way.

In a way, Mike's contributions to this Court and our state's law are more quantifiable than any other justice to have served. The concrete list is remarkable. He served longer than any other appellate judge in Michigan's history. He sat with 22 other justices and participated on panels with 2,005 different cases argued. He wrote 277 dissents, 120 majority opinions, 65 unanimous opinions, and 95 concurring opinions. He ruled on nearly 100,000 cases during his tenure on the Court—more than half of what this Court has ever ruled on. He made elections look easy, winning every time he ran—in 2006 winning almost as many votes as the Governor while on the nonpartisan section of the ballot. And when he was the chief justice, in 1992, he initiated what is now one of his most important legacies: the unique partnership this Court and the courts of our state have with the tribal courts and judges throughout Michigan.

Michigan is home to twelve federally recognized tribes, each with its own court system working to ensure the proper administration of justice within its jurisdiction to resolve disputes in a manner that will be

respected and enforced across jurisdictional lines, and to serve the children, families, and communities whose welfare depends on them.

Mike recognized almost 25 years ago that while separate sovereigns, we have shared interests and goals, most important among these protecting Michigan's children.

In 1992, Mike reached out to Chief Judge [Michael] Petoskey of the Grand Traverse Band of Ottawa and Chippewa Indians to establish the Michigan Indian Tribal Court/State [Trial] Court Forum, bringing state and tribal court judges together to explore the overlapping issues facing their respective courts and to find common ground in their solutions. This partnership produced significant statewide reform.

Michigan Court Rule 2.615 was implemented, providing for state court recognition and enforcement of tribal court judgments. Tribal judges and staff were offered and encouraged to participate in the Michigan Judicial Institute's state court educational programming, and that programming was also broadened to educate state judges and staff about tribal sovereignty and the existence and functioning of tribal courts throughout the state.

The relationships Mike nurtured through the 1992 forum proved just as lasting as its objectives and just as vital to the progress that would be made in years to come.

The Michigan Judicial Association was created, and the coalition of state and tribal partners played an important role in the enactment of the Michigan Indian Family Preservation Act.[1] As a result of the partnerships Mike built, the tribal courts have been a

[1] MCL 712B.1 *et seq*.

critical partner in enforcing child support orders issued by our state courts throughout the state.

In 2014, again with Mike's leadership, shortly before he left the Court, this Court reestablished the Tribal/State, and now Federal, Judicial Forum. Fittingly, both Mike and Chief Judge Petoskey are members of this new forum. I am the Court's liaison to it, and in that role, I have come to understand, in a very personal way, what Mike's leadership in this area has meant to the tribal court judges in this state.

Mike also oversaw the construction of this building, including this magnificent courtroom, which is round in honor of the peacemaking and sentencing circles used by tribal courts.

But the contributions Mike made to this institution, to all of the colleagues with whom he served over the years, and to the people of this state are far greater than the tangible results I have just ticked off, impressive list that it is.

This is an unusual judging job, this multimember court business. And to do it well, you need more than to be smart and thoughtful—which Mike is, in great measure. Effective collegial decision-making requires unique skills. Mike's decency, his civility, his patience, his humor, and his reliably steady commitment to give the work his all, day after day and year after year, made him a master at it.

And Mike could certainly make a hard call when he needed to. Take *People v McDonald*,[2] a 1976 Court of Appeals opinion Mike authored in which he had to engage an important set of due-process and equal-protection questions in deciding whether to strike

[2] *People v McDonald*, 67 Mich App 64; 240 NW2d 268 (1976).

down a statute, one of the bigger moves a court ever has to make, and one which should always give us pause.

The defendant, a licensed cosmetologist, was convicted of cutting the hair of a man in violation of § 55 of the Barber Licensing and Regulation Act of 1968. Yes, I see you tensing up—[laughter]—just hearing me talk about this difficult social issue. You can imagine the conflict and the emotion that Mike had to stare down in deciding these important constitutional questions. Licensed barbers could cut the hair of men and women, but licensed cosmetologists could cut the hair of women only. Mike didn't hesitate. The restriction, he wrote, was "not only anachronistic but unreasonable and unconstitutional as well."[3] I love unconstitutional as third. [Laughter.] It's unreasonable, and it's also unconstitutional. He explained, and I quote: "All hair is created equal—organically and chemically—according to the unanimous trial testimony."[4] My point is, Mike is hilarious. And his sense of humor has been a source of joy to all his colleagues and all of his staff.

I'm told that, once, Justice LEVIN accidentally leaned his chair back a bit too far and tipped over. And the next morning, there was a crash helmet at every justice's seat on the bench, courtesy of Justice CAVANAGH.

When you sit on a collegial court, every time a member changes, the entire body changes, and it has to readjust and settle into its new order. Mike experienced more of those realignments than anyone else in this Court's history, and some, I suspect, were harder than others. And yet there is a steadiness to Mike's

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[3] *Id*. at 69.

[4] *Id*. at 72.

contributions to this collegial body across its many different lives that characterizes Mike.

No matter whether he was writing majority opinions or more dissents, Mike's time on this bench and at our conference table was marked by decency and civility. He never was short on time when a colleague or a clerk needed his help or attention. He was generous and patient, and reliably so. I can't find anyone who has heard him raise his voice.

As most of you know, we communicate with each other often by memo. Mike's memos about his colleagues' work always blended authentic affirmation with constructive suggestions in an effort to persuade. So many law clerks over the years have had the opportunity to see in Mike's work how you can make suggestions and disagree constructively. What a lovely example Mike has been, not just to his own clerks, but for all the clerks who had the pleasure of reading those memos.

Part of Mike's skill in this area, I suspect, derives from his personal economy with respect to the spoken word. He rarely asked the most questions at oral argument, but often asked the single most important question. And if a lawyer could not answer the question, Mike graciously moved on, never embarrassing any advocate. Likewise, he was never the first into the fray of any conference discussion, but waited for the right lull to penetrate it with an insight, never overstated, that changed the conversation. He is closer to a poet than a debater.

My people, Mike's people, have a soft spot for tradition and especially the tradition of hard work. We're known to revere, even idolize, the laborers in our midst. The diggers. We're privately prideful about long hours and our own hard work, and the hard work of

those who paved the way for us. Mike CAVANAGH is a worker. He worked on Great Lakes freighters to put himself through school, and during law school he worked as a claims adjuster. He left this building every day with a suitcase full of reading materials and research. I also know that his clerks often dropped off more work at his home later in the evening. That was what it took to do the job, so that's what he did. That Mike sustained the work ethic required to do the job well for 42 years doesn't surprise his friends and family gathered here, but it's worth noting, nonetheless.

I like Mike's own words on this topic. At Justice [PATRICIA] BOYLE's portrait dedication, Mike said: "Not only must our decisions comport with the law, but we must give our lives to the law. Being a judge, I suggest, is an all or nothing proposition. The best judges give it everything they have. They love their families, but the law wrings them dry."[5] Knowing how Mike feels about his family puts that in perspective.

Seamus Heaney, who you could count on to find the lyrical in simple things like hard work, makes vivid this idea in his poem "Digging" about his father and his grandfather:

> My grandfather cut more turf in a day
> Than any other man on Toner's bog.
> Once I carried him milk in a bottle
> Corked sloppily with paper. He straightened up
> To drink it, then fell to right away
>
> Nicking and slicing neatly, heaving sods
> Over his shoulder, going down and down
> For the good turf. Digging.

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[5] Hon. PATRICIA J. BOYLE Portrait Presentation, 465 Mich ccxiii, ccxlix (2001).

> The cold smell of potato mould, the squelch and slap
> Of soggy peat, the curt cuts of an edge
> Through living roots awaken in my head.
> But I've no spade to follow men like them.
>
> Between my finger and my thumb
> The squat pen rests.
> I'll dig with it.[6]

Mike CAVANAGH had so many tools. He has a spade and a squat pen, but also his wit and his curiosity, and his decency, and a perfectly timed question, and a wry smile. And he used them every day, and most nights, for 42 years in service to this institution, to the people of this great state, and to the rule of law.

Thank you, Mike, for giving it everything you had, for letting it wring you dry. We are all better for it. God bless you. [Applause.]

CHIEF JUSTICE YOUNG: Thank you, Justice MCCORMACK. Our next speaker served four years on the Supreme Court with our guest of honor. DENNIS ARCHER came to the Court in a very typical fashion—appointed by Governor Blanchard. But he left the Court to take on a very unusual challenge for a jurist—to run the city of Detroit.

When you think about it, Dennis and Mike shared a number of commonalities. For example, both are completely and passionately dedicated to public service and giving back to the community. Both rose from humble beginnings to the top of their profession, though I must point out that DENNIS ARCHER claims that his start in life was a bit more humble. And as he

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[6] Heaney, *Death of a Naturalist* (New York: Oxford University Press, 1966), pp 13-14.

explained at a recent speech, "I was born in Detroit and grew up in Cassopolis. We had no running water. We were so poor, we couldn't pay attention!" And that's still true. He can't pay attention. [Laughter.] But now, it's my turn to pay attention to the former president of the [American Bar Association], former mayor of Detroit, and former Supreme Court justice, DENNIS ARCHER. [Applause.]

JUSTICE DENNIS W. ARCHER: May it please the Court. In 1985, as our Chief Justice has just acknowledged, I was appointed to the Michigan Supreme Court by Governor James Blanchard. And I was sworn in in January of 1986 to take the place of former Justice JAMES RYAN, who was going to the Sixth Circuit Court of Appeals. We were in a different building than the one that we are presently in today. And as I look at the distinguished members of our Michigan Supreme Court who work so hard on all of our behalf, I think back to the Court I was privileged to serve on: G. MENNEN WILLIAMS was our chief justice, DOROTHY COMSTOCK RILEY, CHARLES LEVIN, JAMES BRICKLEY, PATRICIA BOYLE, and MICHAEL CAVANAGH. And because Chief Justice G. MENNEN WILLIAMS could not run again and there was no election, ROBERT GRIFFIN became a member of our Court. Mr. Justice JAMES BRICKLEY shared with me, when he came on the Court, how delighted he was that I was joining the Court. But what I would learn as a member of the Court is that every time that there's a new addition to our Court, it changes the chemistry just a bit. We had, and we were very blessed to have, a collegial Court. And when I think about the leadership that was provided and the collegiality that occurred while I was privileged to serve on the Court—Justice MCCORMACK, you may have only served for two years with Mr. Justice CAVANAGH, but you captured the essence of the man, the person, his

humanality, his love of family—still married to the best tie maker in the world—if you've not been privileged to have one, as I was. But you really captured it. I think back to our Court and the challenges that we faced and the issues presented at that time we were serving. It was a very hard-working court. We had one leader who was there, who was always hard-working. He was the essence of friendship, civility, and always had the talent or the ability to pick outstanding and top-flight law clerks that he personally nurtured and worked with and caused them to feel very much a part of our Court family, as well as providing suggestions and recommendations after learning more about what they wanted to do in their future. Mr. Justice LEVIN taught us patience. The only thing that I think could have helped us more was a GPS system, at the time, so we always knew where he was. He was one of the most brilliant writers and thinkers on our Court.

Our Chief Justice, DOROTHY COMSTOCK RILEY, was a person that—much like, I'm sure, our current Chief Justice—believed in being timely and efficient and the like, and thanks to her and her partner, Wally Riley, we now have a Michigan Supreme Court Historical Society that reminds all lawyers who are members of the State Bar of Michigan of what the State of Michigan and what we've accomplished and what we stand for. It is difficult to try to put into words what friendship means, and when you talk about, Mr. Chief Justice, how MICHAEL CAVANAGH came from a family who believed in public service—I'm still asked today questions in terms of having served, having had the privilege of serving as mayor, what I thought about the city of Detroit and the issues and how we've gone through the different elements and the timing that we have. And I always think back to the person that I did not

know as well as I got to know, MICHAEL CAVANAGH, and Jerome P. Cavanagh, who was a remarkable leader, a person well ahead of his time. A person who reached back to the entire community that he served. He was a remarkable person. I'm not sure who he got all those ideas from, but I have a sense from having worked with Mr. Justice MICHAEL CAVANAGH that he got a lot of them right from you. We are very blessed, when you all think about it, to have an opportunity to know people that have a remarkable past, and we don't think about it as we go through our lives. But Bridget helped us today —I'm sorry—Madame Justice helped us today when she spoke of the number of cases that he participated on, whether it was writing majority opinions, signing off on unanimous opinions, or dissenting opinions. That's a huge contribution, and I will tell you that unless you've had the privilege of sitting in one of these chairs and understanding the volume of work that they each go through in coming into the conference meetings to make decisions in terms of what cases should be heard or shouldn't be heard, it's made easier because of the talented men and women who work for this Court, commissioners and the like, who made our lives so much easier. Michael, I can't wait to see what I believe is going to be a spectacular portrait. I know it will capture you because Megan had a whole lot to do with it, and I know that she chose well, and I've heard so much about you, sir. To all of you who came today, thank you for coming to let Mr. Justice MICHAEL CAVANAGH know how much you respected him for his service and his continued service. And for those of you who think that you want to go play golf with MICHAEL CAVANAGH, get some strokes. [Laughter and applause.]

CHIEF JUSTICE YOUNG: Thank you, Mr. Former Everything. [Laughter.] Our next speaker shares more than a last name with Mike CAVANAGH. She shares Mike's

love for the law and exceptional legal talent. And of course, for a Cavanagh, that's not unusual. But it's also probably true that she is the best lawyer from that household. As a dad, that's not a bad thing. Megan revealed the real Mike CAVANAGH when she introduced her father at a recent event and said, "Perhaps the title he is most proud of is 'Papa' to his grandchildren." I know that Mike is also proud of you, Megan, and I'm very much looking forward to hearing more about Mike from someone who knows him best. Megan Cavanagh. And share the good stuff.

MS. MEGAN CAVANAGH: Thank you, Mr. Chief Justice and Honorable Justices of the Court. I am honored to have the opportunity to speak today on behalf of our family to celebrate my dad and to commemorate his place in this Court's history. I did want to state that I will not be waiving my five-minute fire-free time. [Laughter.]

CHIEF JUSTICE YOUNG: You've been here before.

MS. CAVANAGH: And I would like to reserve three minutes of rebuttal for after he speaks. [Laughter.] I did—as you mentioned—I had the privilege of being intimately involved in the creation of this portrait: involved in the fundraising; finding the artist, Mr. Del Priore; arranging the logistics for bringing the portrait into existence; but more importantly, I had the privilege of working with my dad and Mr. Del Priore in their pursuit to capture the man in the justice—to put down on canvas who he is and who he has been to this honorable institution and to this great state. I had a behind-the-scenes seat to witness them select the images which are depicted in the portrait, images that individually and collectively reflect what is important to him and what is important about him and his legacy to this state. So in a few moments, when the portrait is

unveiled, you, too, will get to see all of these things and the final product of Michael's artistic endeavor. And I will let you know in advance—I think it's fantastic. You'll see the justice in the robe that he donned term after term, sitting alongside you. You will see the reporter in his left hand that symbolizes the prolific written history he has given to the people of this state. You will see a Native American walking stick in his right hand, a gift given to him by the Sault Ste. Marie Chippewa Tribe in recognition of his work on behalf of the twelve federally recognized tribes of this state and, as Justice MCCORMACK just spoke about, his commitment to their tribal courts being recognized and respected as a vital part of this state's justice system. And you'll see in the background this grand building in which we gather this afternoon, a monument that he helped design and construct, a true labor of love for him and a lasting testament to his profound admiration for this noble branch of state government. I'm in a somewhat unique position because of my professional career as an attorney and appellate practitioner. I get the opportunity daily to appreciate and benefit from all of these many contributions that he has made. I get to advance my clients' causes to this Court and to the Court of Appeals in this building that he helped construct. I get to study the words he has written in the reporter and apply them—as well as often tried to distinguish them—[laughter]—this body of law that he has created.

And now whenever I walk into this building to apply the law he has helped create to my client's case, I get to see this portrait and to get to see his smiling face. But I would also like to share with you on a more personal level what I see when I look at the portrait. Things that may be less obvious to others, but are just as significant to me and the rest of us that love him. I see my

nephew Brennan's and my nephew Seamus's kind, humble, Irish-blue eyes. I see my brother Mike's capacity for holding and considering other's perspectives, even those that are different from his own, and his commitment to and love for a strong, supportive partner and the families they have created. I see my sister Jane's intelligent and sometimes slightly irreverent humor, and her dogged persistence to hold true to what she believes. I see my nephew Keegan's dry, keen wit and unapologetic confidence in who he is as an individual. I see my Elouise's genuine awe and enjoyment of the good things her life holds and gratitude for the opportunities to love and enjoy the people that we are blessed to call family. And I see my Georgia, my own great dissenter, who challenges not only the premise of your belief, but also at times your reasoning and your conclusion. Who, through her considered questions, challenges you to test and refine not only the foundation of your position, but more importantly, the outer edges of your position, leaving you, more often than not, with the better reasons and more appropriate, circumscribed decision. And perhaps above all, I see the tireless effort, sacrifice, patience, and wise counsel of the woman who has stood behind him and beside him for fifty years, the person who has contributed more to making the man in the justice in this portrait than anyone or anything else. And as I said before, it's a truly fantastic portrait of a truly remarkable man, a man that I have the privilege to call my dad. And so, without anything further, I think we can introduce the artist, Michael Del Priore. [Applause.]

MR. MICHAEL DEL PRIORE: Your Honor, Court, family and friends. I wasn't going to say anything, but I was asked to and I only want to share just a few minutes of what went behind doing this portrait. It's a case of—an artist needs to be found to paint and immortalize

someone who's done such great things for your state, and I want to commend the Court for having the insight to be able to hang these beautiful portraits that you already have in the building, but also the building itself. I've done many chief justices, but I've never been in a building more beautiful than this. This is the most beautiful courtroom and house I've ever seen, so it's an honor and a privilege to have my work to be immortalized here also.

But I knew when I met Justice CAVANAGH the first time—I knew I was going to like him. Because he had three characteristics I really liked. One was he was short. [Laughter.] Two, he had a mustache. [Laughter.] And three, his name was Michael. [Laughter.] And if you don't know, "Michael" means "God-like." But, in doing the portrait, it was a case of doing a lot of preliminary studies, and I asked him what is the most important things to him, and we could have painted—we actually stood out in this balcony area and overlooked the Capitol. And we were going to paint that behind the Justice, but he said, "No, the most important thing to me is this building." So what we did—we went outside, out on the ground, and shot the other way. And we came up with the most beautiful compositions of this building with him in front of it, and I think you will be pleased with what you see. So I just want you to know that he lent himself to the portrait perfectly—he has all the character of a portrait. He kind of has that Roosevelt look, kind of, to him. [Laughter.]

And lastly, to say that I know you will see me again, because when I painted him, he was a little bit fuller. So I may be back to readjust it; I'm not sure. [Laughter.] But all in all, I want the Court to know that I am

thankful and privileged to be a part of this community and this state. Thank you very much. [Applause.]

MS. CAVANAGH: And now, for my brother Mike and my sister Jane to come up to unveil the portrait. [Portrait is unveiled to applause.]

CHIEF JUSTICE YOUNG: That is a wonderful portrait. And the artist has used all of the embalmer's arts to make him look almost alive. [Laughter.] I think it's time for you, Mike, to do your rebuttal.

JUSTICE MICHAEL F. CAVANAGH: I'd like to thank Chief Justice YOUNG and the Justices for convening this special session of the Court for my hanging. [Laughter.] I especially want to thank Lynn Seaks, administrative specialist in the Court's executive office; of course, my lifelong right arm, Marcia Jackman; and all the Court staff involved in planning and executing the details of this special session. Thanks also to Carrie Sampson, executive director of the Supreme Court Historical Society. And I'm honored today by the presence of the society's president, Charlie Rutherford, and its present emeritus, Wally Riley. To Justice Bridget, Justice ARCHER, and Megan, thank each of you for your kind and overly generous remarks. They were just shy of capturing the true magnificence of me. [Laughter.] But they were close.

I really hope each of you know how much I value your support and counsel and, most importantly, your friendship. But as Megan alluded to, my greatest source of support throughout my career has been my family. The love of my life, my wife of fifty years and two-and-a-half weeks, Patsy, has been my constant and steady support. Her love, her counsel, probably most importantly her tolerance, have been inspirational. With her, I've been blessed with three outstanding and supportive children. Our oldest daughter, Jane, is with us; I'm delighted for

her presence. And I'm pleased that Mike and his wife, Katie, and their three sons, Brennan, Seamus and Keegan, are able to be with us—I think they could start a rugby team. [Laughter.] Our youngest daughter, Megan, you've already heard from; she's accompanied by our granddaughters Georgia Grace and Eloise Patricia. Thank you all for your love and support. As I've said before, remember kids, the key is reading, writing, and diagramming. [Laughter.]

I owe a great deal to the love and support of my five siblings. My brothers, Paul and Jerry, and my sister Ann have walked on, to use a tribal colloquialism. My two remaining sisters, Eleanor and Joan, both Irish biddies, still fuss over me and are quick to offer advice, whether solicited or not. They were unable to be with us today, but out of my 29 nieces and nephews, a number representing each of my siblings were able to be with us today. Thanks to all of you for your love and support.

And I, of course, would be remiss if I failed to mention my other family, the one through whose devotion, loyalty, and unselfish efforts our team was able to leave our footprint on Michigan's jurisprudence. The other loves of my life are Yvonne Smith, who assisted me for 25 years before she retired some four years ago. I still miss you, Yvonne, and of course, there's Marcia Jackman. Perhaps the wisest and most fortunate move of my legal career was in selecting this woman as my court reporter some 44 years ago. We have been through thick and thin ever since. Marcia retired from the state at the same time I did, and a large part of Marcia and Yvonne's responsibilities in seeing that our office ran smoothly and efficiently was managing, directing, educating, and mothering our law clerks. I've been fortunate and privileged to have had the loyal

service of 53 outstanding and talented men and women. Their advice, their counsel, their insight and skills were all directed toward the goals of improving the law, making me look good, and keeping me consistent. I am currently Of Counsel to a firm founded by two of my former law clerks, Natalie Alane and Mary Chartier. They are both here today, along with our whole office crew. A number of my other former clerks are also with us today. It's wonderful to see you all again, and thanks again to each of you.

Finally, I'm honored by the presence here today of two stalwarts of this Court with whom I had the privilege of serving for many years. Corbin Davis was appointed Supreme Court Clerk in 1983, the year I joined the Court. For the last few years, he has been serving as the Court's Reporter of Decisions, and I am advised maybe he'll finally be hanging it up later this year. Hopefully that's another party. [Laughter.] The other stalwart is my dear friend Aloysius J. Lynch, who served as the Supreme Court Chief Commissioner from 1979 until his retirement in 2002, some 23 years. Al and Corbin, thank you for your counsel, support, and friendship, and for being here this afternoon.

Well, my ride here on this Court was a number of things. It was exciting, demanding, exasperating, challenging, satisfying, and rewarding. I had the privilege of serving with 22 other justices, each unique with their own talents and personalities. My own role was always to keep doing my part of the work of the Court and to try, where helpful, to assist in gaining consensus. This was not always an easy time, but the answer was the same as in any period in an organization faced with challenges. We needed to stay focused on what was important. Get our work done. Treat each other with respect and courtesy. It sounds trite, but really it's the only way.

And when I say "focus," I think of a poem by the—of course—Irish poet, John Boyle O'Reilly, who lived 1844 to 1890. And the poem is entitled "To-Day," and reads:

> Only from day to day
> The life of a wise man runs;
> What matter if seasons far away
> Have gloom or have double suns?
>
> To climb the unreal path,
> We stray from the roadway here;
> We swim the rivers of wrath,
> And tunnel the hills of fear.
>
> Our feet on the torrent's brink,
> Our eyes on the cloud afar,
> We fear the things we think,
> Instead of the things that are.
>
> Like a tide our work should rise—
> Each later wave the best;
> To-day is a king in disguise,
> To-day is the special test.
>
> Like a sawyer's work is life:
> The present makes the flaw,
> And the only field for strife
> Is the inch before the saw.[7]

In my years on the Court, I tried to realize and accept what I could and couldn't change and to keep my focus on that inch before the saw. I showed up for work at the Supreme Court on the first day of January, 1983. And on January 1, 2007, I started my fourth and final term on the Court. I heard my last Supreme Court

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[7] Roche, *Life of John Boyle O'Reilly: His Complete Poems and Speeches* (New York: Cassell Publishing Co, 1891), pp 508-509.

case on October 22, 2014. And, as has been mentioned, I participated in 2,005 opinions. I enjoyed greatly supervising the construction of this Hall of Justice and working with the late Justice RILEY and Mike Murray to see it become a reality. I learned a tremendous amount from working with our Native American brothers and sisters of Michigan's twelve federally recognized tribes. Overall, I truly have had the experience of a lifetime, and I've been blessed to have served the people of this great state. I hope the Court can continue to enjoy the respect of the people. More than 200 men and women have served on the Michigan Supreme Court. God willing, a far greater number will serve in the future. I received this Court in good shape from those who came before me, and I tried to do everything I could to make sure that whoever came after me would receive a Court that is healthy in every way.

I wish to thank the Court for hanging me in these hallowed halls and to again thank everybody for your past support and friendship, and especially for your presence here today. It has made this a most memorable occasion for me and my family. Thank you again, Mr. Chief Justice. [Applause.]

CHIEF JUSTICE YOUNG: I want to thank everyone who made Mike's second pre-wake possible. [Laughter.] On behalf of the Supreme Court, I am pleased to accept this portrait of Justice MICHAEL F. CAVANAGH. This reflection of our dear friend and former colleague will now join the Court's gallery of historic portraits for all time. In future years, as they look upon it in a nearby restroom—[laughter]—our successors will see this portrait and hopefully understand what made Mike—and not just what a distinguished justice he was, but one of Michigan's greatest public servants. Thank you, Mike.

We are adjourned.

SUPREME COURT CASES

PACE v EDEL-HARRELSON

Docket No. 151374. Decided February 1, 2016.

Barbara Pace brought an action in the Eaton Circuit Court against Jessica Edel-Harrelson, Christy Long, and SIREN/Eaton Shelter, Inc. (SIREN), claiming that she had been discharged from her employment with SIREN in violation of public policy and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiff alleged that she was terminated because she had reported to two supervisors and Edel-Harrison, SIREN's executive director, that Long, a coworker, had told plaintiff that she planned to use SIREN grant money to buy a stove for Long's daughter and implied that plaintiff should document the transaction in the name of a client in order to cover up the unauthorized purchase. Edel-Harrelson claimed that she had fired plaintiff for unrelated misconduct. The court, Conrad J. Sindt, J., granted defendants' motion for summary disposition under MCR 2.116(C)(10), and plaintiff appealed. The Court of Appeals, SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., reversed the trial court's grant of summary disposition on the WPA claim, but affirmed the trial court's summary disposition of the claim of discharge against public policy. 309 Mich App 256 (2015). Defendants applied for leave to appeal in the Supreme Court.

In lieu of granting leave to appeal and without hearing oral argument, in a unanimous opinion per curiam, the Supreme Court *held*:

Under MCL 15.362, the WPA provides protection to an employee who reports a violation or a suspected violation of a law to a public body. The reference in MCL 15.362 to "a violation or a suspected violation of a law" plainly envisions an act or conduct that has actually occurred or is ongoing, and MCL 15.362 contains no language indicating that future, planned, or anticipated acts amounting to a violation or a suspected violation of a law are included within the scope of the WPA. Consequently, a stated intention to commit an act amounting to a violation of a law in the future does not constitute a violation or a suspected violation of a law for purposes of MCL 15.362. Because plaintiff merely reported another's intent to violate a law in the future, plaintiff did

not engage in protected activity under the WPA as a matter of law and has no recourse under that statute. The Court of Appeals decision to the contrary was reversed and the case remanded to the Court of Appeals for consideration of the merits of plaintiff's claim that her discharge violated public policy.

Reversed and remanded to the Court of Appeals for further consideration.

Justice LARSEN took no part in the decision of this case.

STATUTES — WHISTLEBLOWERS' PROTECTION ACT — PROTECTED ACTIVITY — REPORTING SUSPECTED VIOLATIONS OF LAW.

MCL 15.362 provides protection to an employee who reports a violation or a suspected violation of a law to a public body; reporting that a person has expressed an intent to violate a law in the future is not protected activity under the Whistleblowers' Protection Act.

Law Offices of Lisa C. Ward, PLLC (by *Lisa C. Ward* and *Nicole J. Schmidtke*), for plaintiff.

Foley & Mansfield, PLLP (by *Greg Meihn* and *Melinda A. Balian*), for defendants.

PER CURIAM. This case requires the Court to consider the application of Michigan's Whistleblowers' Protection Act (WPA) to an employee who alleges that she was terminated because she reported a coworker's plan to violate the law. Pursuant to MCL 15.362, the WPA provides protection to an employee who reports "a violation or a suspected violation of a law" to a public body. Because "a violation or a suspected violation" refers to an existing violation of a law, the plain language of MCL 15.362 envisions an act or conduct that has actually occurred or is ongoing. MCL 15.362 contains no language encompassing future, planned, or anticipated acts amounting to a violation or a suspected violation of a law. Because plaintiff in the instant case merely reported another's intent to violate a law in the future, plaintiff has no recourse under the

WPA. Accordingly, we reverse the Court of Appeals' contrary decision and remand this case to that court for further consideration.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff, Barbara Pace, brought suit against her former employer, SIREN Eaton Shelter, Inc. (SIREN),[1] SIREN executive director, Jessica Edel-Harrelson, and SIREN operations manager, Christy Long, claiming that she was wrongfully terminated on January 18, 2012, in violation of the WPA.

Plaintiff claims Long stated that she intended to use SIREN grant money to purchase a stove for her daughter. According to plaintiff, Long implied that plaintiff should document the transaction in the name of a specific client to cover up the unauthorized purchase. Long denies ever using grant funds for this purpose or ever discussing such a purchase with plaintiff.

Plaintiff testified that she contacted two of her supervisors to inform them of Long's plans. When plaintiff's supervisors did not act upon her warning, plaintiff reported her incident with Long directly to Edel-Harrelson in December 2011 or early January 2012. Plaintiff stated in her deposition that, at that time, she believed that Long had already purchased the stove with grant funds. Plaintiff alleges that Edel-Harrelson told plaintiff that she would look into the matter, but Edel-Harrelson claimed in a later deposition that she had no recollection of this discussion with plaintiff.[2]

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[1] SIREN is a nonprofit entity that provides services to survivors of domestic violence.

[2] After plaintiff filed her complaint in April 2012, Edel-Harrelson investigated plaintiff's claim against Long and found no wrongdoing on Long's part. As the Court of Appeals acknowledged, defendants do not dispute that if Long had actually purchased a stove with grant funds, or

SIREN terminated plaintiff's employment on January 18, 2012. Plaintiff alleges that she was terminated for reporting her conversation with Long to Edel-Harrelson. SIREN's stated reason for terminating plaintiff's employment was plaintiff's allegedly harassing and intimidating behavior toward a fellow employee in violation of defendants' employment policies in a January 2012 incident.[3] The termination letter stated that plaintiff was terminated because she "engaged in behavior that resulted in fear and intimidation in coworkers, and which was witnessed by three employees."

On April 10, 2012, plaintiff brought the instant action, alleging that her termination was in violation of the WPA. On August 21, 2013, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not establish a prima facie case under the WPA because (1) no conduct had occurred that could be considered a violation or suspected violation of a law, and, therefore, plaintiff did not engage in "protected activity" under the WPA and (2) plaintiff could not demonstrate a causal connection between her alleged report of a suspected violation of a law and her termination.

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taken sufficient steps to constitute an attempt of such a purchase, she would have committed the crime of embezzlement or attempted embezzlement. See MCL 750.174.

[3] Defendants presented evidence that on or about January 10, 2012, plaintiff made an inappropriate comment to a coworker. Plaintiff admitted making the comment as a joke. When Carol Hatch, a coworker who witnessed the comment, told plaintiff that the remark was inappropriate, plaintiff asked Hatch if she wished to go "toe to toe" with her. The incident was reported to plaintiff's supervisor, Martha Miller, who discussed the incident the next day with Edel-Harrelson. Edel-Harrelson instructed Miller to issue plaintiff a verbal warning. When Miller met with plaintiff to issue that warning, Hatch averred that plaintiff became angry and approached Hatch in a threatening manner in the presence of two other case managers. Plaintiff denied that she engaged in any physically intimidating behavior.

On November 6, 2013, the circuit court granted summary disposition in favor of defendants, ruling that plaintiff failed to establish that a violation or suspected violation of a law occurred. On February 24, 2015, the Court of Appeals reversed the circuit court's ruling with respect to plaintiff's WPA claim.[4] According to the panel, plaintiff presented sufficient evidence to establish a genuine issue of material fact that she had engaged in "protected activity" and that the alleged protected activity was causally connected to her subsequent termination, rendering summary disposition improper. The panel remanded for proceedings consistent with its opinion. Defendants filed an application for leave to appeal in this Court, arguing that plaintiff failed to establish a prima facie claim under the WPA because there was no evidence that any conduct or actions were taken that constituted a violation or a suspected violation of a law. After review of the briefs filed on the application for leave to appeal, in lieu of granting leave to appeal, we summarily reverse the Court of Appeals and remand this case to that court for further consideration.

II. STANDARD OF REVIEW

The interpretation of the WPA presents a statutory question that this Court reviews de novo.[5] This Court also reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10).[6]

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[4] *Pace v Edel-Harrelson*, 309 Mich App 256; 870 NW2d 745 (2015). Plaintiff also asserted an alternative claim that her discharge was against public policy. The trial court dismissed that claim, ruling that there was no public policy basis to support it. And, in light of its reversal on the WPA claim, the Court of Appeals found it unnecessary to address the merits of the public policy claim. See *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011).

[5] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

[6] *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).

III. ANALYSIS

The pertinent issue before this Court is whether plaintiff has stated a viable claim under the WPA. The applicable provision of the WPA, MCL 15.362, states the following:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

This provision protects an employee who has reported, or is about to report, a violation or suspected violation of a law to a public body. To establish a prima facie case under MCL 15.362, a plaintiff must show that "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action."[7]

Our initial, and ultimately dispositive, inquiry is whether plaintiff engaged in "protected activity" as articulated in MCL 15.362 when she reported Long's alleged plan to purchase a stove with SIREN grant money to Edel-Harrelson. When interpreting a statute, the primary goal is to give effect to the intent of the

[7] *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003) (citations omitted).

Legislature by construing the language of the statute.[8] When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted.[9] When a statute does not expressly define a term, courts may consult dictionary definitions to ascertain its ordinary and generally accepted meaning.[10]

MCL 15.362 states that the WPA applies to employees who report "a violation or a suspected violation of a law" to a public body.[11] We agree with the Court of Appeals that a plaintiff need not necessarily report an actual violation of a law to receive protection under this provision, as MCL 15.362 explicitly provides protection for "a suspected violation of a law."[12] Nonetheless, we disagree with the Court of Appeals to the extent it held "that, where an employee has a good faith and reasonable belief that a violation of the law . . . is being actively planned, the report of that belief is []sufficient to trigger the protections of the WPA."[13]

The reference in MCL 15.362 to "a violation or a suspected violation of a law" plainly envisions an act or conduct that has actually occurred or is ongoing. A common dictionary defines "violation" in part as "the act of violating: the state of being violated[.]"[14] This

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[8] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[9] *Id*.

[10] *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008) (citations omitted).

[11] Defendants concede that SIREN is a "public body" for purposes of the WPA.

[12] *Debano-Griffin v Lake Co*, 486 Mich 938, 938 (2010).

[13] *Pace*, 309 Mich App at 268.

[14] *Merriam-Webster's Collegiate Dictionary* (11th ed).

definition contemplates an existing act that has occurred or is ongoing. That is, "a violation or a suspected violation" refers to an existing violation. The provision must therefore be read in the context of some conduct or act that has already occurred or is occurring, and not some conduct or act that may or may not occur. MCL 15.362 contains no language indicating that future, planned, or anticipated acts amounting to a violation or a suspected violation of a law are included within the scope of the WPA. Consequently, a stated intention to commit an act amounting to a violation of a law in the future does not constitute "a violation or a suspected violation of a law" for purposes of MCL 15.362 as a matter of law.[15]

Plaintiff reported to Edel-Harrelson Long's stated plans to commit a *future* act in violation of the law. Plaintiff claimed in her deposition that Long said she was "going to use the money" to buy the stove and agreed that Long "was simply telling [plaintiff] what her intention was." Plaintiff therefore did not engage

[15] We also find persuasive the Minnesota Court of Appeals' interpretation of that state's Whistleblowers' Act, which contains language very similar to MCL 15.362 of the WPA. See Minn Stat § 181.932(1) (stating that an employer shall not discharge an employee when that employee in good faith "reports a violation or suspected violation of any federal or state law or rule . . . to an employer . . ."). Interpreting § 181.932(1), the Minnesota Court of Appeals recognized that it "does not apply where an employee alleges that the employer contemplated but refrained from unlawful conduct." *Grundtner v Univ of Minnesota*, 730 NW2d 323, 330 (Minn App, 2007). Rather, "the statutory language [of section 181.932] speaks to conduct which has already transpired, and the fact that an avenue of action has been contemplated by the employer and rejected insulates that conduct from the whistleblower proscriptions." *Id*. (quotation marks and citations omitted). Notably, after *Grundtner*, the Minnesota Legislature amended § 181.932(1) to provide protection to an employee who reports "a violation, suspected violation, *or planned violation* of any federal or state law or common law or rule adopted pursuant to law . . . to an employer . . . ."

in "protected activity" for purposes of the WPA, as plaintiff's report of a suspected planned or future violation of a law is not encompassed within the protections provided by MCL 15.362.

In holding to the contrary, the Court of Appeals relied in part on plaintiff's statement in her deposition that at the time of her report to Edel-Harrelson, she "believed" Long had already purchased the stove. Based on this statement, the Court of Appeals concluded that plaintiff reported a "suspected violation of an actual law" and that defendants' argument that plaintiff only suspected that Long might purchase the stove in the future is inconsistent with the record.

However, the WPA provides protection to an employee only where that employee "reports or is about to report" a violation or a suspected violation of a law.[16] Thus, an employee's unexpressed personal belief when making a report is not relevant for purposes of MCL 15.362. There is no indication in the record that plaintiff reported to Edel-Harrelson her belief that Long had already purchased the stove. Instead, the record indicates that plaintiff reported only her "incident" with Long, referring to the conversation pertaining to Long's plans to purchase the stove using grant funds in the future. Therefore, because plaintiff reported a suspected future violation of a law, not a suspected existing violation, plaintiff did not engage in "protected activity" for purposes of the WPA, regardless of her deposition testimony pertaining to her subjective belief at the time of her report to Edel-Harrelson.

In sum, the evidence presented by plaintiff indicates that Long merely announced her intention to commit a violation of a law in the future. Consequently, because

[16] MCL 15.362.

plaintiff reported a suspected future violation of a law rather than "a violation or a suspected violation of a law," she did not engage in protected activity as a matter of law.[17] By concluding to the contrary, the Court of Appeals unduly expanded the scope of the clear and plain language of the WPA without legislative approval.

IV. CONCLUSION

Because plaintiff reported Long's announced intention to buy a stove with unauthorized grant funds, which constituted an expression of an intent to act in the future, not an accomplished or ongoing act, plaintiff has not established conduct that qualifies as "a violation or a suspected violation of a law" under MCL 15.362. Consequently, plaintiff did not engage in "protected activity" under the WPA as a matter of law.[18] In lieu of granting defendants' application for leave to appeal, we summarily reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of the merits of plaintiff's claim of discharge against public policy.[19]

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred.

LARSEN, J., took no part in the decision of this case.

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[17] The Court of Appeals' comparison of the instant case to *Debano-Griffin*, 486 Mich at 938, is misguided. The plaintiff in *Debano-Griffin* reported a suspected *existing* violation of a law.

[18] Because we conclude that plaintiff did not engage in "protected activity" under MCL 15.362, we need not consider defendants' argument that plaintiff failed to demonstrate a causal connection between her report to Edel-Harrelson and her termination.

[19] See *Anzaldua*, 292 Mich App at 631 ("[I]f the WPA does not apply, it provides no remedy and there is no preemption.") (citations omitted).

ELHER v MISRA

Docket No. 150824. Decided February 8, 2016.

Paulette Elher brought a medical malpractice action in the Oakland Circuit Court against Dwijen Misra, Jr., and others, seeking damages after Misra accidentally clipped her common bile duct while performing a laparoscopic cholecystectomy. Plaintiff sought to admit expert testimony stating that clipping a patient's common bile duct during an otherwise uncomplicated laparoscopic cholecystectomy was a breach of the applicable standard of care. Plaintiff also claimed that negligence could be inferred from the improperly clipped bile duct under the doctrine of res ipsa loquitur. Defendants moved to exclude plaintiff's proposed expert testimony on the ground that, because it was not supported by peer-reviewed literature or the opinions of other physicians, it did not meet the standards for reliability set forth in MRE 702 and MCL 600.2955. The court, Colleen A. O'Brien, J., excluded the expert testimony, ruled that the doctrine of res ipsa loquitur was inapplicable, and granted defendants' motion for summary disposition. Plaintiff appealed. The Court of Appeals, BECKERING, P.J., and GLEICHER, J. (HOEKSTRA, J., concurring in part and dissenting in part), affirmed in part, reversed in part, and remanded the case for further proceedings. 308 Mich App 276 (2014). The Court of Appeals majority held that the trial court had abused its discretion by incorrectly applying MRE 702 to exclude the testimony of plaintiff's expert witness because the factors that the trial court considered were not relevant to the expert's testimony, which did not involve an unsound scientific methodology or questionable data. Rather, the majority concluded, whether injuring the common bile duct violated the applicable standard of care called for a value judgment derived from training and experience. The majority agreed, however, with the trial court that the doctrine of res ipsa loquitur did not apply to plaintiff's claim. The dissent agreed with the majority's analysis of the res ipsa loquitor issue, but concluded that the trial court did not abuse its discretion by excluding the testimony of plaintiff's expert regarding the standard of care because no basis had been offered for the testimony

apart from the expert's own personal views. Defendants sought leave to appeal.

In an opinion per curiam signed by Chief Justice YOUNG and Justices MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955, and MCL 600.2169. MCL 600.2169 relates to the expert's license and qualifications. MRE 702 requires that the trial court ensure that each aspect of a proposed expert witness's testimony, including the underlying data and methodology, is reliable. MCL 600.2955 requires the trial court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert. In this case, plaintiff's expert was qualified to testify as an expert given his extensive experience. The question was whether his opinion, that absent scarring or inflammation it is virtually always a breach of the standard of care to clip the common bile duct during a laparoscopic cholecystectomy, was sufficiently reliable under the principles articulated in MRE 702 and MCL 600.2955. It is within a trial court's discretion to decide how to determine reliability in a given case, and all the enumerated factors for determining reliability listed in MCL 600.2955 may not be relevant in every case. The trial court in this case did not abuse its discretion by relying on two of the statutory factors: (1) whether the opinion and its basis had been subjected to peer-reviewed publication and (2) the degree to which the opinion and its basis were generally accepted within the relevant expert community. First, contrary to the Court of Appeals majority's opinion, defendants presented evidence that there was peer-reviewed medical literature suggesting that most bile duct injuries occur because of misperception and that such misperception errors do not constitute negligence. Therefore, the issue had been studied in peer-reviewed literature, but plaintiff failed to submit any peer-reviewed medical literature supporting her expert's opinion. Second, although some evidence was presented indicating that some physicians agreed with plaintiff's expert, there was no evidence regarding the degree to which his opinion was generally accepted in the relevant expert community. On the other hand, the trial court abused its discretion by relying on the fact that the opinion of plaintiff's expert had not been subjected to scientific testing or replication because that statutory factor was

not relevant to the type of opinion at issue. But that error did not render the trial court's ultimate ruling under MCL 600.2955 an abuse of discretion given that plaintiff relied solely on her expert's background and experience, factors that are generally insufficient, standing alone, to support a finding of reliability. The trial court also did not abuse its discretion by concluding that the proposed testimony of plaintiff's expert was deficient because it did not meet the requirements of MRE 702. The opinion of plaintiff's expert was not based on reliable principles or methods, his opinion was contradicted by the opinion of defendant's expert and published literature on the subject that was admitted into evidence, and there was no literature supporting the testimony of plaintiff's expert admitted into evidence. While peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered the opinion of plaintiff's expert unreliable and inadmissible under MRE 702. The trial court did not abuse its discretion by concluding that the experience and background of plaintiff's expert were not sufficient to deem his opinion reliable under MRE 702 and MCL 600.2955 given the absence of other evidence supporting his opinion.

Judgment of the Court of Appeals reversed; trial court order excluding the testimony of plaintiff's expert and granting summary disposition in favor of defendants reinstated.

Justice BERNSTEIN, dissenting, would have affirmed for the reasons stated in the Court of Appeals majority opinion.

Justice LARSEN took no part in the decision of this case.

EVIDENCE — EXPERT TESTIMONY — MEDICAL MALPRACTICE — STANDARD OF CARE — RELIABILITY — STATUTORY FACTORS.

MCL 600.2955 requires the trial court to determine whether an expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert; it is within the trial court's discretion to decide how to determine reliability in a given case, and all the enumerated factors for determining reliability listed in MCL 600.2955 may not be relevant in every case.

Speaker Law Firm, PLLC (by *Steven A. Hicks*), and *DeNardis & Miller, PC* (by *Ronald F. DeNardis*), for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Donald K. Warwick*), and *Plunkett Cooney* (by *Robert G. Kamenec*) for defendants.

PER CURIAM. In this medical malpractice case, we must determine whether the circuit court abused its discretion by excluding plaintiff's expert medical testimony under MRE 702. The circuit court granted summary disposition in favor of defendants after excluding the opinion testimony of plaintiff's expert, Dr. Paul Priebe, concluding that it was inadmissible under MRE 702 because it was not reliable and did not meet the requirements of MCL 600.2955. The Court of Appeals, in a split opinion, reversed the circuit court and remanded, concluding that the circuit court incorrectly applied MRE 702 and abused its discretion by excluding Priebe's testimony. The Court of Appeals dissent concluded that the circuit court did not abuse its discretion.

We hold that, under the facts of this case, in which Priebe admitted that his opinion was based on his own personal beliefs, there was no evidence that his opinion was generally accepted within the relevant expert community, there was no peer-reviewed medical literature supporting his opinion, plaintiff failed to provide any other support for Priebe's opinion, and defendant submitted contradictory, peer-reviewed medical literature, the circuit court did not abuse its discretion by excluding Priebe's testimony. The Court of Appeals clearly erred by concluding otherwise. We therefore reverse the judgment of the Court of Appeals and reinstate the opinion and order of the Oakland Circuit Court.

I. FACTS AND PROCEEDINGS

Plaintiff, Paulette Elher, underwent a laparoscopic cholecystectomy (removal of the gallbladder) per-

formed by defendant Dr. Dwijen Misra, Jr., on August 18, 2008. Before the surgery, Misra discussed the risks and benefits of the surgery with plaintiff, and plaintiff signed a consent form that specifically mentioned a risk of injury to the common bile duct. It is undisputed that, during the surgery, Misra inadvertently clipped the common bile duct leading from plaintiff's liver,[1] resulting in plaintiff having to undergo emergency surgery to remove the clip and repair the duct so that bile could again drain from her liver. According to Misra, "[t]he view from the laparoscope is not optimal and not recognized as optimal and illusions can be created in which the [common bile duct] could be clipped." Misra estimated that this complication occurs in 0.5 to 2% of all laparoscopic gallbladder surgeries.

On February 3, 2011, plaintiff filed suit in Oakland Circuit Court, alleging that Misra breached the applicable standard of care by clipping the common bile duct.[2] Plaintiff's sole standard-of-care expert was Priebe, a board-certified general surgeon and professor at Case Western Reserve University. At his deposition, Priebe testified that, in his opinion, it is virtually always malpractice to injure the common bile duct during a laparoscopic cholecystectomy, absent extensive inflammation or scarring. He considered plaintiff's injury in this case to be a breach of the standard of care, but did not provide any supporting authority for his opinion.

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[1] During this procedure, medical clips are placed and remain on the cystic artery and cystic duct to ensure against, respectively, postoperative blood loss and bile leakage. Misra admitted that "when [he] clipped the common [bile] duct, [he] thought [he was] clipping the cystic duct."

[2] Plaintiff also claimed that the doctrine of res ipsa loquitur applied and Misra's professional corporation and Beaumont Hospital were vicariously liable under the theory of respondeat superior. Those claims are not before us.

Q. So this [case] falls within your own self-definition of what the standard of care and breach would be in such a case; is that correct?

A. Correct.

Q. You cannot cite to any medical literature whatsoever that supports that opinion, true?

A. Medical literature doesn't discuss standard of care.

Q. So is that true, sir?

A. It's true. But medical literature does not discuss standard of care.

Q. Well, you know, there are a host of colleagues of yours, national and local, who would disagree with you in terms of the only caveats being a breach of the standard of care being extensive scarring or inflammation; isn't that correct?

A. They're entitled to their opinion. In my opinion, that is a breach of the standard of care and malpractice.

* * *

Q. Can you cite one current general surgery colleague at Case Western University who agrees with your position, to your knowledge, that other than these caveats of extensive scarring or inflammation, it is always a breach of the standard of care to cause injury to the common bile duct during a laparoscopic cholecystectomy?

A. I've never discussed this with any of them. I have no idea what their opinions are.

* * *

Q. And as it relates to [your standard-of-care] opinion, you cannot cite to a shred of medical literature, a medical authority, to support that opinion other than your own belief system, true?

A. There is no authority that exists to do that, so that's true. But there is no authority that does that. So the answer is true.

* * *

Q. Do you know whether . . . any of you other colleagues in the Case Western system agree with that position?

A. I've never discussed it with them. I wouldn't know.

Q. Can you cite to one colleague in the general surgery field, a board certified general surgeon, who agrees with your position that the only caveats to injury to the common bile duct with laparoscopic cholecystectomy would be extensive scarring or inflammation?

A. I wouldn't know. I've never asked any of my other surgical colleagues, so I would have no idea what their opinion is.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing, among other things, that Priebe failed to meet the requirements of MRE 702 and MCL 600.2955 because his opinion was unreliable. Plaintiff responded that expert testimony was not required because Misra's negligence would be obvious even to a layperson and that Priebe's opinion was, nonetheless, reliable under the factors listed in MCL 600.2955 given Priebe's experience and qualifications. Defendants replied by filing affidavits from several experts and at least one peer-reviewed publication supporting their opinions that clipping the common bile duct is a known potential complication of laparoscopic cholecystectomy because of the lack of depth perception on the two-dimensional video monitor used to view the area while performing the surgery.

The circuit court concluded that plaintiff had failed to address whether her expert's testimony was reliable under MRE 702 or met any of the requirements of MCL 600.2955. According to the court, plaintiff merely pointed to Priebe's experience and background to argue that his opinion was reliable and, therefore, admissible, but plaintiff's expert was required to present more than his own opinions, credentials, and the

number of procedures he had performed. The circuit court concluded that there was no evidence that Priebe's opinion and its basis were subjected to scientific testing and replication, no evidence that Priebe's opinion and its basis were the subject of peer-reviewed publication, and no evidence regarding the degree to which his opinion and its basis were generally accepted in the relevant expert community. The court noted that Priebe admitted that there was no authority supporting his opinion regarding the standard of care, that he was not aware of anyone who agreed with his opinion, and that he could not cite any medical literature supporting his beliefs, although he claimed that medical literature discussing the standard of care did not exist. Given this evidence, the circuit court concluded that the testimony of plaintiff's expert regarding the standard of care was unreliable and inadmissible and granted summary disposition in favor of defendants on plaintiff's malpractice claim.

Plaintiff appealed the circuit court's decision in the Court of Appeals, which reversed the circuit court in a split opinion.[3] The majority held that the circuit court incorrectly applied MRE 702 and abused its discretion by concluding that Priebe's testimony was inadmissible. The majority characterized this case as "a difference of opinion among highly qualified experts" and concluded that the experts disagreed on "an issue outside the realm of scientific methodology." Therefore, neither MRE 702 nor MCL 600.2955 stood in the way of Priebe's testimony. The majority rejected as irrelevant the three guideposts relied on by the circuit court—the absence of scientific testing and replication, the lack of evidence that Priebe's opinion and its basis were subjected to peer-reviewed publication, and

[3] *Elher v Misra*, 308 Mich App 276; 870 NW2d 335 (2014).

plaintiff's failure to demonstrate the degree to which Priebe's opinion and its basis were generally accepted in the relevant expert community.

First, the majority concluded that no evidence of testing or replication supported either side's expert opinions. The majority failed to understand how such standard-of-care opinions could ever be tested or replicated. Because Priebe's opinion did not implicate any possible testing or replication, the majority concluded that the circuit court abused its discretion by using this factor to exclude his testimony.

Second, with regard to peer-reviewed publication, the majority stated that Priebe testified that there was no peer-reviewed literature addressing whether clipping the common bile duct qualified as a breach of the standard of care and concluded that defendants' article submissions did not rebut Priebe's statement. The majority concluded that the article authored by Dr. Josef E. Fischer and submitted by defendants was an editorial expressing an opinion that supported rather than refuted Priebe's thesis that common bile duct injuries can represent standard-of-care violations. The article authored by Dr. Lawrence Way and submitted by defendants similarly acknowledged that some bile duct injuries are the product of negligence, said the majority. The majority concluded that the circuit court abused its discretion by relying on the lack of peer-review to exclude Priebe's testimony because no evidence supported that the standard-of-care issue debated by the experts had been tested, analyzed, investigated, or studied in peer-reviewed articles.

Finally, the majority concluded that no widespread acceptance of a standard-of-care statement could be found. The majority reasoned that the record reflected no disagreement about the standard of care, only

regarding what circumstances give rise to a breach of that standard. The majority noted that the Fischer and Way articles verified that "purists" in the surgical world agreed with Priebe. There was no evidence presented that addressed whether Priebe's view had general acceptance, the majority admitted, but the majority concluded that was not surprising because the question was not an empirical one. Thus, the majority determined that the general-acceptance guidepost was not relevant and that the record supported Priebe's assessment that no authority and no literature defined what constitutes a breach of the standard of care.

The Court of Appeals dissent would have affirmed the grant of summary disposition, concluding that the circuit court did not abuse its discretion by excluding the expert testimony of Priebe. The dissent stated that Priebe provided no basis for his understanding regarding what the standard of care required or the manner in which it was breached. Priebe conceded that his views were based on his own "belief system," for which he failed to provide any supporting authority. Quoting Priebe's testimony, the dissent concluded that Priebe offered no basis for his asserted knowledge of the standard of care or his opinion that there was a breach in this case. The dissent stated that it may be that Priebe held himself to a higher, or different, standard than that practiced by the medical community at large and that Priebe's experience alone, without any supporting literature, was insufficient to allow him to testify that Misra committed malpractice. In a footnote, the dissent pointed out that while the majority characterized Priebe's opinion as consistent with the "purists" referred to in the Fischer and Way articles, there is no indication that these articles, or the thinking of other "purists," informed Priebe's opinion.

II. STANDARD OF REVIEW

We review the circuit court's decision to exclude evidence for an abuse of discretion.[4] "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes."[5] We review de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules.[6] The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion.[7]

III. ANALYSIS

Defendants contend that the circuit court did not abuse its discretion by excluding Priebe's testimony. We agree.

A plaintiff in a medical malpractice action must establish "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury."[8] "Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard."[9] An exception exists when the professional's breach of the standard of care is so obvious that it is within the common knowledge and experience of an

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[4] *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

[5] *Id.*, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[6] *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012).

[7] *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

[8] *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994).

[9] *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983).

ordinary layperson.[10] The proponent of the evidence has the burden of establishing its relevance and admissibility.[11]

"The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169."[12] MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable.[13] MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*,[14] in order to interpret the equivalent federal rule of evidence.[15] "Under *Daubert*, 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not

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[10] *Id*. (citations and quotation marks omitted).

[11] *Edry*, 486 Mich at 639 (citation and quotation marks omitted).

[12] *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067 (2007). MCL 600.2169 relates to the expert's license and qualifications and is not in dispute in this case.

[13] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

[14] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[15] *Edry*, 486 Mich at 639-640.

only relevant, but reliable.' "[16] A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony.[17] "Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible."[18]

MCL 600.2955(1) requires the court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert, and by considering seven factors:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

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[16] *Id*., quoting *Daubert*, 509 US at 589.

[17] *Edry*, 486 Mich at 640.

[18] *Id*. at 642.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

At the outset, we reject plaintiff's contention that this is a case in which the breach of the standard of care is so obvious to a layperson that no expert testimony is required. Priebe himself conceded that some professionals believe that clipping the common bile duct, absent extensive scarring or inflammation, is not necessarily a breach of the standard of care. Accordingly, expert testimony was required to prove the applicable standard of care and a breach of that standard of care in this case.[19]

There is no doubt that Priebe, plaintiff's sole expert regarding the standard of care, was qualified to testify as an expert based on his extensive experience. On the basis of this experience, he opined that, absent extensive scarring or inflammation, it is virtually always a breach of the standard of care to clip the common bile duct. In Priebe's opinion, because there was no evidence of scarring or inflammation, Misra breached the standard of care in this case. The question is whether this opinion was sufficiently reliable under the principles articulated in MRE 702 and by the Legislature in MCL 600.2955.

The Court of Appeals viewed this case as one in which the experts' opinions were outside the realm of scientific methodology and in which Priebe's opinion was reliable given his specialized experience and knowledge. The United States Supreme Court has recognized, as did the circuit court, that the *Daubert* factors may or may not be relevant in assessing reliability, depending on the nature of the issue, the expert's expertise, and the subject of the expert's

[19] *Sullivan*, 417 Mich at 407.

testimony.[20] And even though the United States Supreme Court has stated that, in some cases, "the relevant reliability concerns may focus upon personal knowledge or experience,"[21] the Court has also stated that even in those cases, the *Daubert* factors can be helpful,[22] even if all of the factors may not necessarily apply in determining the reliability of scientific testimony.[23] Accordingly, it bears repeating that it is within a trial court's discretion how to determine reliability.[24]

We conclude that the circuit court did not abuse its discretion by relying on two of the factors listed in MCL 600.2955 and by concluding that Priebe's opinion was not reliable. First, the Court of Appeals erred by concluding that the issue debated by the experts was not studied in peer-reviewed articles and, therefore, that the circuit court abused its discretion when it relied on this factor. The majority conceded that the article authored by Way was peer-reviewed. Way concluded, after analyzing 252 operations, that 97% of injuries occur because of misperception and that such misperception errors do not constitute negligence. Thus, the issue being debated has been studied. Plaintiff, however, failed to submit any peer-reviewed medical literature in support of Priebe's opinion, and Priebe admitted that he knew of none.

The circuit court also did not abuse its discretion by relying on the lack of evidence regarding the degree to which Priebe's opinion was generally accepted.[25] The

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[20] *Kumho Tire Co v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

[21] *Id*.

[22] *Id*. at 151.

[23] *Id*.

[24] *Id*. at 152.

[25] See MCL 600.2955(1)(e).

Court of Appeals majority misinterpreted this factor. The majority concluded that there was no widespread acceptance of any standard-of-care statement. But this factor requires the court to consider "[t]he *degree* to which the opinion and its basis are generally accepted within the relevant expert community."[26] Priebe admitted that he knew of no one that shared his opinion. While the articles submitted by defendants may have suggested that "purists" in the field agreed with Priebe, there was still no indication regarding the degree of acceptance of his opinion. The majority conceded that there was no evidence regarding whether Priebe's view had general acceptance within the relevant expert community. This was a relevant factor for the circuit court to consider.[27]

We do, however, agree with the Court of Appeals majority that all the factors in MCL 600.2955 may not be relevant in every case. Indeed, we agree with the majority that the scientific testing and replication factor does not fit the type of opinion at issue in this case. Therefore, the circuit court abused its discretion by relying on this factor. But this does not render the circuit court's ultimate decision an abuse of discretion. Plaintiff merely pointed to Priebe's background and experience in regard to the remaining factors, which is generally not sufficient to argue that an expert's opinion is reliable. Priebe admitted that his opinion was based on his own beliefs, there was no medical literature supporting his opinion, and plaintiff failed to provide any other support for Priebe's opinion.

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[26] MCL 600.2955(1)(e) (emphasis added).

[27] Defendants claim that Priebe's opinion is novel and, therefore, inadmissible because plaintiff failed to establish that it has achieved "general scientific acceptance" under MCL 600.2955(2). However, MCL 600.2955(2) refers to a novel *methodology or form of scientific evidence*, not opinion; therefore, this provision is inapplicable.

The circuit court also did not abuse its discretion by concluding that Priebe's testimony was deficient because it did not conform to MRE 702. We find this Court's decision in *Edry v Adelman* to be instructive. In *Edry*, this Court concluded that an expert failed to meet the requirements of MRE 702 because his opinion "was not based on reliable principles or methods;" his opinion was contradicted by the opinion of the defendant's expert and published literature on the subject that was admitted into evidence, which even he acknowledged as authoritative; and there was no literature supporting the testimony of plaintiff's expert admitted into evidence.[28] As in *Edry*, Priebe's opinion "was not based on reliable principles or methods," his opinion was contradicted by the opinion of defendant's expert and published literature on the subject that was admitted into evidence, and there was no literature supporting the testimony of plaintiff's expert admitted into evidence.[29] Plaintiff failed to provide any support for Priebe's opinion that would demonstrate that it had some basis in fact and that it was the result of reliable principles or methods. While peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered Priebe's opinion unreliable and inadmissible under MRE 702.

IV. CONCLUSION

We hold that the circuit court did not abuse its discretion by concluding that Priebe's background and experience were not sufficient to render his opinion reliable in this case when Priebe admitted that his

[28] *Edry*, 486 Mich at 640.

[29] *Id*.

opinion was based on his own beliefs, there was no evidence that his opinion was generally accepted within the relevant expert community, there was no peer-reviewed medical literature supporting his opinion, plaintiff failed to provide any other support for Priebe's opinion, and defendants submitted contradictory peer-reviewed literature. As noted by the Court of Appeals dissent, the concern in relying on Priebe's personal opinion is that Priebe may have held himself to a higher, or different, standard than that practiced by the medical community at large.[30] This is particularly true where, as here, there is contradictory medical literature. For the reasons stated, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the May 13, 2013 opinion and order of the Oakland Circuit Court which excluded Priebe's testimony and granted summary disposition in favor of defendants.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred.

BERNSTEIN, J. (*dissenting*). I would affirm for the reasons stated in the Court of Appeals majority opinion. I believe the Court of Appeals reached the right result for the right reasons.

LARSEN, J., took no part in the decision of this case.

[30] We disagree with plaintiff's characterization of this case as one in which the standard of care is undisputed.

JESPERSON v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 150332. Argued December 9, 2015 (Calendar No. 2). Decided March 21, 2016.

Alan Jesperson was injured in a motor vehicle accident on May 12, 2009, when his motorcycle was struck from behind by a vehicle owned by Mary Basha and driven by Matthew Badelalla while Badelalla was making deliveries for Jet's Pizza. Auto Club Insurance Association (ACIA) was notified of Jesperson's injuries and that it was the highest-priority no-fault insurer on June 2, 2010, and it began making payments to Jesperson on July 23, 2010. Jesperson brought an action against Basha, Badelalla, and Jet's in the Macomb Circuit Court on December 1, 2010, seeking damages for the injuries he had sustained. He later moved to amend his complaint to add a claim against ACIA after it stopped paying him no-fault benefits. The court, Mark S. Switalski, J., entered a default judgment against Badelalla and Basha, entered an order allowing Jesperson to amend the complaint, and entered an order severing Jesperson's claims for trial. A jury returned a verdict of no cause of action with regard to Jesperson's claims against Jet's. Before trial on the remaining claim, ACIA moved for summary disposition, arguing that Jesperson's claim against it was barred by the statute of limitations in MCL 500.3145(1). The court agreed that the statute of limitations barred Jesperson's claim and granted ACIA's motion for summary disposition. On appeal, the Court of Appeals, BOONSTRA, P.J., and METER, J. (SERVITTO, J., dissenting), affirmed, holding that the exception in MCL 500.3145(1) to the one-year limitations period when the insurer has previously made a payment applies only if the insurer has made a payment within one year after the date of the accident. 306 Mich App 632 (2014). The Supreme Court granted Jesperson's application for leave to appeal.

In a unanimous opinion by Justice MCCORMACK, the Supreme Court *held*:

The first sentence of MCL 500.3145(1) allows for an action for no-fault benefits to be filed more than one year after the date of the accident causing the injury if the insurer has made a payment of no-fault benefits for the injury at any time before the action is commenced. Because such a payment was made in this case, the

exception applied, and the question whether the defendant waived the statute of limitations by failing to properly plead it was moot.

1. MCL 500.3145(1) provides that an action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than one year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within one year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. This sentence establishes a one-year statute of limitations with two exceptions. The "notice" exception allows the filing of an action for no-fault benefits more than one year after the date of the accident if written notice of injury has been given to the insurer within one year after the accident. The "payment" exception allows the filing of an action for no-fault benefits more than one year after the date of the accident if the insurer has previously made a payment of personal protection insurance benefits for the injury. The statute's plain language supports the position that "previously" means prior to the commencement of the action, rather than before the expiration of one year after the date of the accident. First, the Legislature used the word "or" to separate the notice exception and the payment exception, which indicates that the notice and payment exceptions should be treated as independent alternatives. Second, the Legislature chose to use the phrase "within 1 year after the accident" in the notice exception and the word "previously" in the payment exception, which indicates that "previously" must mean something different from "within 1 year after the accident." Third, the Legislature's word choice in the second sentence of MCL 500.3145(1) indicates that the exception is satisfied by any prior payment. The second sentence provides that if the notice has been given or a payment has been made, the action may be commenced at any time within one year after the most recent allowable expense, work loss, or survivor's loss has been incurred. While the second sentence of § 3145(1) refers to "the notice," it also refers to "a payment," suggesting that while the Legislature was referring to a specific notice—the notice given to the insurer within one year after the accident—it was not referring to a specific payment made at any particular time but rather to any payment previously made. Reading the word "previously" to mean "prior to the commencement of the action" does not render it completely surplusage or devoid of meaning, while interpreting "previously" to mean "within 1 year after the accident" would considerably undermine the significance of the payment exception.

2. Interpreting the payment exception to apply whenever an insurer has made a payment does not produce an absurd result. Even when a plaintiff may bring an action for payment of no-fault benefits more than one year after the date of an accident because the insurer has made a payment outside that window, MCL 500.3145(1) still applies a statute of limitations that limits when a plaintiff can bring a cause of action and a one-year-back rule that limits how much a plaintiff can recover. Furthermore, it is only by virtue of an action by the defendant—the payment of no-fault benefits—that this exception to the statute of limitations is applicable.

Court of Appeals judgment reversed; trial court order vacated; case remanded to the trial court for further proceedings.

INSURANCE — NO-FAULT — STATUTE OF LIMITATIONS — EXCEPTIONS — PAYMENT OF BENEFITS BEFORE ACTION COMMENCED.

An action for no-fault benefits may be filed more than one year after the date of the accident causing the injury if the insurer has made a payment of no-fault benefits for the injury at any time before the action is commenced (MCL 500.3145(1)).

Mark Granzotto, PC (by *Mark Granzotto*), and *Law Offices of Michael J. Morse, PC* (by *Eric M. Simpson* and *Lewis A. Melfi*), for plaintiff.

Secrest Wardle (by *Brian E. Fischer* and *Drew W. Broaddus*) for defendant.

MCCORMACK, J. Among the questions before us is whether an insurer's payment of no-fault benefits to a plaintiff more than one year after the date of the plaintiff's motor vehicle accident satisfies the second exception to the one-year statute of limitations established in the first sentence of MCL 500.3145(1) of the no-fault act, MCL 500.3101 *et seq*.[1] We conclude that

[1] We granted leave to appeal and directed the parties to address:

(1) whether the defendant adequately raised the affirmative defense of the one-year statute of limitations stated in MCL 500.3145(1) without explicitly describing it in its answer to the plaintiff's amended complaint; (2) if not, whether the Court of

such a payment does satisfy this exception. Accordingly, we reverse the judgment of the Court of Appeals, vacate the trial court's order granting summary disposition in favor of the defendant, and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Alan Jesperson, was involved in a motor vehicle accident on May 12, 2009. The accident was reported to defendant, Auto Club Insurance Association (ACIA), on June 2, 2010, more than one year after the accident. On July 23, 2010, ACIA began paying personal protection insurance benefits, or no-fault benefits, to Jesperson. When ACIA subsequently notified Jesperson that it was terminating payment of his benefits, Jesperson amended his existing lawsuit against the driver of the other vehicle involved in the accident to add ACIA as a defendant, claiming that ACIA was wrongfully refusing to pay no-fault benefits.

The trial was scheduled to begin on February 19, 2013. On January 22, 2013, the defendant filed a motion for summary disposition in which it argued for the first time that the plaintiff's claim was barred by the one-year statute of limitations provided in MCL 500.3145(1). The trial court agreed with the defendant

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Appeals erred in rejecting the plaintiff's argument that the defendant waived the affirmative defense by pointing to the trial court's authority to exercise its discretion to allow the defendant to amend its answer; and (3) if the defendant did not waive the statute of limitations defense, whether its payment of benefits to the plaintiff more than one year after the date of the accident satisfied the second exception to the one-year statute of limitations established in the first sentence of § 3145(1). [*Jesperson v Auto Club Ins Ass'n*, 497 Mich 987 (2015).]

In light of our disposition of issue (3), we decline to address issues (1) and (2).

that the plaintiff's claim was barred by the one-year statute of limitations and dismissed the plaintiff's claim.

In a split, published decision, the Court of Appeals affirmed the trial court, holding that the exception in MCL 500.3145(1) to the one-year limitations period when the insurer has previously made a payment applies only if the insurer has made a payment within one year after the date of the accident. Thus, the exception did not apply in this case because the defendant's payments to the plaintiff did not begin until more than one year after the accident.[2] Judge SERVITTO dissented, concluding that the defendant had waived the statute of limitations affirmative defense by failing to properly plead it and stating that, accordingly, she would not have reached the statutory interpretation question.[3]

We granted the plaintiff's application for leave to appeal.

II. ANALYSIS

The first sentence of MCL 500.3145(1) of the no-fault act establishes a one-year statute of limitations with two exceptions:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.

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[2] *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632; 858 NW2d 105 (2014).

[3] *Id*. at 653 (SERVITTO, J., dissenting).

The first exception—the "notice" exception—allows the filing of an action for no-fault benefits more than one year after the date of the accident if "written notice of injury . . . has been given to the insurer within 1 year after the accident[.]" MCL 500.3145(1). The second exception—the "payment" exception—allows the filing of an action for no-fault benefits more than one year after the date of the accident if "the insurer has previously made a payment of personal protection insurance benefits for the injury." *Id*.

The critical issue here is the meaning of the word "previously" in the payment exception. The plaintiff contends that "previously" means prior to the commencement of the action; the defendant argues that "previously" means before the expiration of one year after the date of the accident. This Court reviews de novo questions of statutory interpretation, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012), as well as a trial court's decision whether to grant a motion for summary disposition. *Id*.

When interpreting statutory language, we begin with the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). Additionally, when determining this intent we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks and citation omitted). We conclude that the statute's plain language supports the plaintiff's reading of the statute.

First, the Legislature used the word "or" to separate the notice exception and the payment exception. " 'Or' is . . . a disjunctive [term], used to indicate a disunion, a separation, an alternative." *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011), quoting *Mich Pub Serv Co v City of Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949) (alteration in original). See also *Badeen v PAR, Inc*, 496 Mich 75, 84 n 17; 853 NW2d 303 (2014) (noting that, because the phrases in the statute defining a collection agency are separated by the disjunctive "or," "a person need only engage in *one* of the enumerated actions to satisfy the statutory definition"). Thus, the word "or" here indicates that the notice and payment exceptions should be treated as independent alternatives.

Second, the Legislature chose to use the phrase "within 1 year after the accident" in the notice exception and the word "previously" in the payment exception. Courts have a duty to give meaning to the Legislature's choice of one word over another. *Robinson v Detroit*, 462 Mich 439, 459, 461; 613 NW2d 307 (2000). "This Court will not assume that the Legislature inadvertently made use of one word or phrase instead of another." *People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012). "Previous" means "coming or occurring before something else; prior[.]" *Random House Webster's College Dictionary* (2d ed, 2001). We conclude that "previously" must mean something different from "within 1 year after the accident."

Third, the Legislature's word choice in the second sentence of § 3145(1) supports the plaintiff's reading of the payment exception that the exception is satisfied by any prior payment. The second sentence provides:

> If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year

> after the most recent allowable expense, work loss or survivor's loss has been incurred. [MCL 500.3145(1).]

As this Court has explained:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . ." *Random House Webster's College Dictionary*, p 1382. [*Robinson v City of Lansing*, 486 Mich 1, 14 (2010) (explaining that the phrase "*the* highway" must refer to a specific or particular highway, while the phrase "*a* highway" would refer to highways in general) (quotation marks and citation omitted; alteration in original).]

While the second sentence of § 3145(1) refers to "the notice," it also refers to "a payment," suggesting that while the Legislature was referring to a specific notice—the notice given to the insurer within 1 year after the accident—it was not referring to a specific payment made at any particular time but rather to any payment previously made. See also *Robinson*, 462 Mich at 461 (discussing that the phrase "*a* proximate cause" should not be interpreted in the same way as the phrase "*the* proximate cause" because "[o]ur duty is to give meaning to the Legislature's choice of one word over the other") (emphasis added).

The defendant argues that the plaintiff's reading of the statute renders the word "previously" surplusage. While this argument is not without merit, reading the word "previously" to mean "prior to the commencement of the action" does not leave it completely "surplusage" or devoid of meaning. At the same time, the defendant's proposed reading of the statute, i.e., interpreting "previously" to mean "within 1 year after the accident," would considerably undermine the significance of the payment exception. The notice exception

applies if the required notice has been provided to the insurer within one year after the accident. MCL 500.3145(1). For an insurer to make a benefits payment for an injury from an accident, the insurer must have received notice that the accident occurred. That is, if an insurer makes a payment within one year after an accident, the insurer would in all likelihood have already received the required notice of the accident. In other words, if the payment exception only operates if payment has been made within one year after an accident, this exception operates only if the notice exception would also in all likelihood apply. To give full effect to the Legislature's intention, we must avoid an interpretation that renders the payment exception all but surplusage.[4] See *Hannay*, 497 Mich at 57.

Finally, contrary to the conclusion of the Court of Appeals majority, interpreting the payment exception to apply whenever an insurer has made a payment does not produce an absurd result. Even when a plaintiff may bring an action for payment of no-fault benefits more than one year after the date of an accident because the insurer has made a payment outside that window, MCL 500.3145(1) still applies a statute of limitations that limits when a plaintiff can

[4] We recognize that MCL 500.3145(1) requires the notice to be in writing and that it contain "the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury." Therefore, if the insured, for example, provided the insurer with only *oral* notice of the injury within one year of the accident and the insurer made a payment of benefits within that same period, the notice exception would not apply because written notice had not been provided, but the payment exception would apply because a payment had been made. In other words, the defendant's reading of the statute would not render the payment exception completely surplusage. It would, however, undermine the significance of a much larger portion of the statute than the plaintiff's reading.

bring a cause of action[5] and a one-year-back rule that limits how much a plaintiff can recover.[6] Accordingly, the Court of Appeals majority was wrong to conclude that the plaintiff's interpretation of this exception would "essentially eliminate the limitations period of MCL 500.3145(1) in cases in which an insurer has ever paid anything on a claim[.]" *Jesperson*, 306 Mich App at 644. Furthermore, it is only by virtue of an action by the defendant—the payment of no-fault benefits—that this exception to the statute of limitations is applicable. A plain-language reading of this statute does not produce an absurd result.

Therefore, we conclude that the payment exception to the one-year statute of limitations in § 3145(1) applies when the insurer makes a payment prior to the commencement of an action for no-fault benefits. Because such a payment was made in this case, the exception applies, and the question of whether the

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[5] The second sentence of MCL 500.3145(1) provides:

> If the notice has been given or a payment has been made, the action may be commenced at any time *within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred*. [Emphasis added.]

See also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005) ("[MCL 500.]3145(1) contains two limitations on the time for filing suit . . . .").

[6] The third sentence of MCL 500.3145(1) provides that "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." See also *Devillers*, 473 Mich at 574 ("Thus, although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred (provided that notice of injury has been given to the insurer or the insurer has previously paid PIP benefits for the injury), § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action.").

defendant waived the statute of limitations by failing to properly plead it is moot; thus, we decline to address it. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010) (explaining that this Court generally will not decide moot issues).

III. CONCLUSION

We hold that the first sentence of MCL 500.3145(1) allows for an action for no-fault benefits to be filed more than one year after the date of the accident causing the injury if the insurer has either received notice of the injury within one year of the accident or has made a payment of no-fault benefits for the injury at any time before the action is commenced. Accordingly, we reverse the Court of Appeals judgment, vacate the trial court's grant of summary disposition for the defendant, and remand to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MCCORMACK, J.

BECK v PARK WEST GALLERIES, INC

Docket No. 151687. Decided March 24, 2016.

Brian Beck, Audrey Mahoney, David and Felice Oppenheim, Patty Brown, and others brought an action in the Oakland Circuit Court against Park West Galleries, Inc., and others, alleging, *inter alia*, breach of contract and fraud. Plaintiffs had purchased art from defendants on separate occasions over a period of years. Each sale was accompanied by an invoice under which the parties agreed to the terms of the transaction. By 2007, the invoices included a standard arbitration clause, but earlier invoices did not include the arbitration agreement. Plaintiffs brought suit, claiming that the art they had purchased from Park West was not worth what Park West had represented as its value. The court, Nanci J. Grant, J., granted summary disposition in favor of defendants, determining that the arbitration clause was enforceable and required arbitration of all disputes arising from transactions with invoices containing the arbitration clause. The court further determined that the remaining claims brought by the Oppenheims, which concerned purchases made in 2003 and 2004, were barred by the statute of limitations. Mahoney, Brown, and the Oppenheims appealed. Defendants cross-appealed, disputing the circuit court's ruling that not all the Oppenheims' claims were subject to arbitration. In an unpublished opinion, the Court of Appeals reversed in part, holding that the arbitration clause in invoices for the later transactions extended to earlier transactions for which the invoices did not contain an arbitration clause. Mahoney, Brown, and the Oppenheims sought leave to appeal.

In a unanimous opinion per curiam, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Arbitration is a matter of contract, and a party cannot be required to arbitrate an issue that he or she did not agree to submit to arbitration. In this case, plaintiffs' purchases were of unique pieces of art purchased on different cruise ships in various international waters in different years. Each unique transaction,

accompanied by a separate invoice, constituted a separate and distinct contract, capable of independent enforcement. Michigan law requires that separate contracts be treated separately. The invoices pertaining to the Oppenheims' 2003 and 2004 purchases did not require any dispute arising from those purchases to be arbitrated. The arbitration clause contained in later invoices could not be applied to disputes arising from the 2003 and 2004 purchases. The only claims subject to arbitration were those arising from invoice agreements containing an arbitration clause. A general policy favoring arbitration cannot trump the actual intent and agreement of the parties. Each transaction at issue involved a separate and distinct contract, and the facts did not support a conclusion that the parties intended for the arbitration clause contained in the later invoices to apply retroactively to the earlier contracts.

That portion of the Court of Appeals judgment that extended the arbitration clause to the parties' separate, prior transactions reversed; case remanded to the Court of Appeals for consideration of the issues raised in plaintiffs' appeal that the Court did not previously address to the extent those issues related to claims not subject to arbitration. Leave denied in all other respects.

Kaufman, Payton & Chapa, PC (by *Donald L. Payton* and *Brian A. Catrinar*), for Audrey Mahoney, David and Felice Oppenheim, and Patty Brown.

Seyburn Kahn, PC (by *Joel H. Serlin* and *Barry M. Rosenbaum*), for Park West Galleries, Inc., Albert Scaglione, Morris Shapiro, Albert Molina, and Plymouth Auctioneering Services, Ltd.

PER CURIAM. This case requires the Court to consider whether an arbitration clause included in invoices for plaintiffs' artwork purchases applies to disputes arising from plaintiffs' previous artwork purchases when the invoices for the previous purchases did not refer to arbitration. We agree with plaintiffs that the arbitration clause contained in the later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain the clause. Each transaction

involved a separate and distinct contract, and the facts do not reasonably support a conclusion that the parties intended for the arbitration clause to retroactively apply to the previous contracts.

Accordingly, we reverse that part of the Court of Appeals judgment that extends the arbitration clause to the parties' prior transactions that did not refer to arbitration. We remand this case to the Court of Appeals for consideration of the issues raised in plaintiffs' appeal that the Court did not address to the extent those issues relate to claims that are not subject to arbitration. In all other respects, leave to appeal is denied because we are not persuaded that the remaining question presented should be reviewed by this Court.

I. BASIC FACTS AND PROCEEDINGS

Defendant Park West Galleries, Inc. (Park West) sold art on various cruise ships traversing international waters. Plaintiffs[1] purchased art from Park West on multiple occasions over the course of several years while on different cruise ships in different locations.

With each sale, Park West provided plaintiffs with a certificate of authentication and a written appraisal, both of which were signed by agents of defendants.[2] All the purchases made by plaintiffs were also accompanied by a signed invoice under which the parties agreed to the terms of the transaction. By 2007, the invoices that Park West provided with plaintiffs' pur-

[1] The action was originally filed by 12 plaintiffs, but most agreed to dismiss their claims, leaving only plaintiffs Audrey Mahoney, David Oppenheim, Felice Oppenheim, and Patty Brown.

[2] The owners of Park West, Albert Scaglione and Albert Molina; the gallery director, Morris Shapiro; and Plymouth Auctioneering Services, Ltd., are also defendants in this matter. All defendants are in the same position for purposes of this appeal.

chases contained an agreement to arbitrate all claims concerning the transaction, which provided in pertinent part:

> ARBITRATION OF CLAIMS AND DISPUTES AND WAIVER OF JURY TRIAL. Any disputes or claims of any kind, including but not limited to the display, promotion, auction, purchase, sale or delivery of art, items, or appraisals shall be brought solely in non-binding arbitration and not in any court or to any jury. . . . All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator(s).

However, prior invoices provided with plaintiffs' purchases contained no such clause.[3]

According to plaintiffs, years after they made their purchases, they discovered that the art purchased from Park West was not actually worth the represented value and that some of the art was forged. Plaintiffs filed the instant suit against defendants on September 28, 2011, asserting claims of breach of contract, breach of warranty of fitness, fraud, negligent misrepresentation, conspiracy, conversion, negligence, intentional infliction of emotional distress, violation of the sales of fine art act,[4] violation of the Art Multiple Sales Act,[5] and violation of the Michigan Consumer Protection Act.[6]

On June 1, 2012, the trial court granted defendants' first motion for summary disposition under MCR

[3] All the invoices for the 2007 and 2008 purchases made by Mahoney and Brown contained the arbitration clause, but only some of the invoices for the Oppenheims' purchases did. The Oppenheims purchased four pieces of art from defendants: one in 2003, one in 2004, one in 2008, and one in 2009. The invoices for the Oppenheims' purchases in 2003 and 2004 did not contain the arbitration clause, but the invoices for purchases made in 2008 and 2009 did.

[4] MCL 442.321 *et seq*.

[5] MCL 442.351 *et seq*.

[6] MCL 445.901 *et seq*.

2.116(C)(7) with respect to claims arising out of transactions with invoices that contained the arbitration clause. The trial court determined that the clause was enforceable and required arbitration of all disputes arising from the purchases described in those particular invoices. The trial court thus dismissed all claims brought by plaintiffs Audrey Mahoney and Patty Brown and some of the claims brought by plaintiffs David and Felice Oppenheim. The trial court declined to dismiss any of the claims brought by the Oppenheims that involved purchases in which the invoices did not contain an arbitration clause, concluding that the arbitration clause in the later invoices did not extend to transactions with invoices that did not contain the clause.

Defendants filed a second motion for summary disposition under MCR 2.116(C)(7), alleging that the rest of the Oppenheims' claims were barred by the statute of limitations. The trial court agreed in a September 6, 2013 order and opinion and dismissed the Oppenheims' remaining claims.

Mahoney, Brown, and the Oppenheims appealed in the Court of Appeals. Defendants cross-appealed, disputing the trial court's ruling that not all the Oppenheims' claims were subject to arbitration. The Court of Appeals reversed in part, holding that the arbitration clause in invoices for the later-executed transactions extended to prior transactions for which the invoices did not contain the clause.[7] Consequently, all the

[7] *Beck v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2015 (Docket No. 319463). The Court of Appeals majority adopted the reasoning of the dissent in a prior, virtually identical case involving different plaintiffs. *Id*. at 4-7, citing *Cohen v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2012 (Docket No. 302746) (MURRAY, J., dissenting in part).

Oppenheims' claims were deemed subject to arbitration and dismissed. Mahoney, Brown, and the Oppenheims then filed an application for leave to appeal in this Court, arguing in relevant part that the Court of Appeals erred by concluding that all their claims are subject to arbitration.[8]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7).[9] Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of "an agreement to arbitrate . . . ." Whether an issue is subject to arbitration is also reviewed de novo.[10]

III. ANALYSIS

"Arbitration is a matter of contract."[11] Accordingly, we must apply the same legal principles that govern contract interpretation to the interpretation of an arbitration agreement. Our primary task in construing a contract is to give effect to the parties' intentions at the time they entered into the contract, which requires an examination of the language of the contract accord-

[8] While the Oppenheims, Mahoney, and Brown also argued in their application to appeal in this Court that the arbitration clauses themselves are invalid, we are not persuaded that this question should be reviewed by this Court. Consequently, for purposes of this opinion, hereafter the term "plaintiffs" will refer to the Oppenheims, because they are the only plaintiffs at issue in this appeal who purchased art covered by invoices that did not contain the arbitration clause.

[9] *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

[10] *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

[11] *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975).

ing to its plain and ordinary meaning.[12] We must interpret and enforce clear and unambiguous language as it is written.[13]

With these principles in mind, the pertinent issue for our review is whether the Court of Appeals erred by concluding that the arbitration clause included in the parties' later invoices encompassed disputes arising from earlier transactions when the invoices for the earlier transactions did not contain the clause. We conclude that the Court of Appeals erred because "[a] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration,"[14] and there is no evidence from which this Court can conclude that the parties' intended to subject the earlier transactions to arbitration.

Michigan law requires that separate contracts be treated separately.[15] Plaintiffs' purchases were of

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[12] *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014).

[13] *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

[14] *Kaleva*, 393 Mich at 587.

[15] See *Mich Nat'l Bank v Martin*, 19 Mich App 458, 462; 172 NW2d 920 (1969). The Restatement of Contracts supports the notion that separate contracts are to be treated separately. For example, comment *d* regarding Restatement Contracts, 2d, § 231, pp 197-198, provides in relevant part:

> The rules that protect parties whose performances are to be exchanged under an exchange of promises apply only when the promises are exchanged as part of a single contract. . . . [I]f one or more promises by each party are not part of the consideration for one or more promises by the other party, there are instead separate exchanges. . . . In deciding whether there is a single contract rather than separate contracts, the court must look to the actual bargain of the parties . . . to decide whether each promise on one side was sought and given as at least part of the exchange for each promise on the other side.

unique pieces of art purchased on different cruise ships in various international waters on different dates. Each unique transaction, accompanied by a separate invoice, constituted a separate and distinct contract, capable of independent enforcement. The invoices pertaining to plaintiffs' 2003 and 2004 purchases did not require any dispute arising from those purchases to be arbitrated; those invoices contained absolutely no reference to arbitration. There is, therefore, no basis on which to conclude that at the time of those purchases the parties intended to arbitrate any disputes that might arise.

Accordingly, disputes arising from plaintiffs' 2003 and 2004 purchases are subject to arbitration only if the arbitration clause contained in the 2008 and 2009 invoices can be retroactively applied to the earlier transactions. Michigan law, however, has long recognized that contracts generally cannot be construed to operate retroactively,[16] and there is no basis on which to find that the parties in the instant case intended for the later arbitration clauses to apply retroactively in contravention of this general principle. The Court of Appeals erroneously concluded that the phrase "[a]ny

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Similarly, comment *b* regarding Restatement, § 240, p 230, provides in relevant part:

> If there are two separate contracts, one party's performance under the first and the other party's performance under the second are not to be exchanged under a single exchange of promises, and even a total failure of performance by one party as to the first has no necessary effect on the other party's duty to perform the second.

[16] See *Hyatt v Grover & Baker Sewing-Machine Co*, 41 Mich 225, 227; 1 NW 1037 (1879) (holding that a surety contract would only apply prospectively given that the contract did not specify retroactive application); *Brockway v Petted*, 79 Mich 620, 626; 45 NW 61 (1890) (stating that a surety contract only applies to future events unless otherwise provided in the contract).

disputes or claims of any kind" contained in the arbitration clause was sufficiently broad to encompass disputes arising under prior contracts that did not contain the clause. However, it is significant that the plain language of the invoices that contained the arbitration clause does not refer to previous transactions between the parties let alone suggest that the clause was to apply to such transactions. Similarly, the 2003 and 2004 invoices do not indicate that the terms of a subsequent contract between the parties might apply to the 2003 and 2004 transactions. Having examined all the facts, we are unable to conclude that the parties intended the interpretation adopted by the Court of Appeals.

The Court of Appeals relied heavily on the proposition that Michigan courts " 'resolve all conflicts in favor of arbitration,' "[17] and particularly on *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*,[18] in which this Court stated:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. . . ." Absent an "*express provision* excluding [a] particular grievance from arbitration" or the "*most forceful evidence* of a purpose to exclude the claim", . . . the matter should go to arbitration[.]

A majority of the Court of Appeals panel determined that this language was controlling and resolved the issue in favor of defendants.[19]

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[17] *Beck*, unpub op at 7 (citation omitted).

[18] *Kaleva*, 393 Mich at 592, quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960) (alteration in original).

[19] Judge HOEKSTRA disagreed with the majority's conclusion that the arbitration clause included in later invoices applied to disputes over the earlier transactions for which the invoices did not contain the arbitration clause.

While this language recognized "[t]he policy favoring arbitration of disputes arising under collective bargaining agreements," it does not remotely suggest that an arbitration agreement between parties outside the collective-bargaining context applies to any dispute arising out of any aspect of their relationship.[20] That is, a general policy favoring arbitration cannot trump the actual intent and agreement of the parties. This is not to say that an arbitration clause in a later contract can never be applied to a previous contract, but the facts of this case do not provide for such retroactive application. Consequently, there is no basis on which to conclude that disputes arising from plaintiffs' 2003 and 2004 purchases are subject to arbitration.

Moreover, the analysis in *Kaleva* is inapplicable to the factual circumstances of the instant case. In *Kaleva*, the relevant arbitration provision was contained in a collective-bargaining agreement, the terms of which governed the plaintiff's employment with the defendant. There was no dispute that the collective-bargaining agreement containing the clause was applicable to the parties' employment relationship, and the relevant issue was simply whether the plaintiff's particular grievance fell within the terms of the arbitration clause. In contrast, the arbitration clause in the instant case was extended from distinct contracts concerning separate transactions to disputes over earlier transactions with their own distinct contracts. Therefore, the facts and issues presented in *Kaleva* were very different from those presented here. Consequently, the analysis in *Kaleva* is not helpful in resolving the instant matter and does not compel the result reached by the Court of Appeals.

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[20] *Kaleva*, 393 Mich at 591.

We are also not persuaded by the federal authority cited by the Court of Appeals. In those cases, the federal courts held that the terms of later-executed contracts applied to previous dealings between the same parties. See *Levin v Alms & Assoc, Inc*, 634 F3d 260 (CA 4, 2011), and *Watson Wyatt & Co v SBC Holdings, Inc*, 513 F3d 646 (CA 6, 2008). Those cases are distinguishable from the present case because the litigants' transactions in the federal cases were ongoing and regular, evincing a steady and continuous business relationship. In the instant case, the parties' transactions were sporadic and irregular, evincing nothing more than the execution of separate and distinct transactions that were distant in time. The inclusion of the arbitration clause in the later contracts at issue here did not put plaintiffs on notice that it was to apply to all previous contracts between the parties.

In sum, the undisputed facts do not reasonably support the conclusion that the parties intended for the arbitration clause contained in the invoices for some transactions to apply to separate and distinct prior transactions. There simply is no legal basis on which to retroactively insert an arbitration clause into the parties' 2003 and 2004 contracts. Consequently, only plaintiffs' claims arising from purchases for which the invoices included the arbitration clause are subject to arbitration.

IV. CONCLUSION

We disagree with the Court of Appeals' conclusion that, by signing an invoice containing an arbitration clause, plaintiffs agreed to arbitrate not only disputes regarding transactions described in that invoice, but also disputes regarding past transactions, regardless of whether the invoices associated with the past trans-

actions included an arbitration clause. The plain language of plaintiffs' 2003 and 2004 invoices makes no mention of arbitration, and there is no basis on which to conclude that the parties intended for the arbitration clause contained in their 2008 and 2009 invoices to retroactively apply to the earlier transactions.

Because we conclude that the only claims subject to arbitration are those arising from invoice agreements containing an arbitration clause, we reverse that part of the Court of Appeals judgment that applied the arbitration clause to the parties' prior transactions completed without reference to arbitration. We remand this case to the Court of Appeals for consideration of the issues raised in plaintiffs' appeal that the Court did not address to the extent those issues relate to claims that are not subject to arbitration. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

PEOPLE v TRIPLETT

Docket No. 151434. Decided March 28, 2016.

Jason E. Triplett was tried by jury in the Allegan Circuit Court for domestic violence, MCL 750.81(2), carrying a concealed weapon (CCW), MCL 750.227(1), and felonious assault, MCL 750.82. The charges arose after he threatened to use his utility knife to escape from two men who had stopped their vehicle when they spotted defendant and his wife fighting on the side of the road. The court, Kevin W. Cronin, J., instructed the jury that self-defense was a defense to the charge of felonious assault but that it was not a defense to the charge of CCW. Defendant was acquitted of felonious assault, but he was convicted of domestic violence and CCW. Defendant appealed in the Court of Appeals, and the Court of Appeals, BECKERING, P.J., and BORRELLO and GLEICHER, JJ., agreed that self-defense was not a defense to CCW. 309 Mich App 252 (2015). Defendant appealed.

In an opinion per curiam signed by Chief Justice YOUNG and Justices MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, the Supreme Court *held*:

The common-law affirmative defense of self-defense is available to a defendant who carries an instrument that becomes an "other dangerous weapon," for purposes of the CCW statute, when the defendant uses the instrument as a weapon.

In this case, the trial court improperly instructed the jury that the affirmative defense of self-defense did not apply to the charge of CCW, and the Court of Appeals erred by approving of the trial court's instruction. Defendant's utility knife became an "other dangerous weapon" when defendant used it as a weapon, and defendant was entitled to present the affirmative defense of self-defense to justify his use of the utility knife. Contrary to the Court of Appeals' conclusion that a defendant's purpose for concealing an "other dangerous weapon" is irrelevant to the defendant's culpability for CCW, the Supreme Court held that a defendant's use or purpose for carrying an "other dangerous weapon" is always relevant to determining a defendant's guilt of CCW.

Reversed and remanded. CCW conviction vacated.

Justice LARSEN took no part in the decision of this case.

CRIMINAL LAW — UNLAWFULLY CARRYING A CONCEALED WEAPON — DEFENSES — SELF-DEFENSE.

The common-law affirmative defense of self-defense may be raised by a defendant charged with unlawfully carrying a concealed weapon under MCL 750.227 for concealing an instrument that is a dangerous weapon only because it was used as a weapon.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*) for defendant.

PER CURIAM. We consider in this case whether the common-law affirmative defense of self-defense is available to a defendant charged with carrying a concealed weapon (CCW), MCL 750.227, when the concealed weapon is an "other dangerous weapon." The defendant was convicted of CCW under MCL 750.227(1) for carrying an "other dangerous weapon" concealed on his person when he used a utility knife as a weapon. Contrary to the Court of Appeals' determination, we conclude that the common-law affirmative defense of self-defense is available to a defendant charged with CCW for concealing an instrument which is a dangerous weapon only because it is used as a weapon. Accordingly, we reverse the judgment of the Court of Appeals, vacate the defendant's CCW conviction, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2012, the defendant and his wife attended a party together, but they disagreed about

when to leave. The defendant's wife was intoxicated and angry when the defendant insisted they leave before she was ready. Shortly after returning home over her objection, the defendant's wife left their home on foot to return to the party. The defendant followed her in his truck, hoping to persuade her to return home. When his wife refused to get back into the defendant's truck, they engaged in a shoving match on the side of the road.

Two men driving by observed the struggle and stopped to assess the situation. They offered the defendant's wife a ride, and she got into the back seat of their vehicle. The defendant attempted to intervene and to remove his wife from the car, but one of the men stopped him. According to the defendant, the man choked him, and the defendant responded by pulling out a utility knife with a two-inch blade, which he held in the air and threatened to use if the man did not let go. When they broke free from each other, the two men left the scene with the defendant's wife and called 911. The defendant, who also left the scene, was arrested at his home.

The defendant was charged with felonious assault, CCW, and domestic violence, and the case was tried to a jury. The trial court instructed the jury that self-defense was an available defense to the defendant's felonious assault charge but that it was not an available defense to the CCW charge. The jury found the defendant not guilty of the felonious assault charge, but convicted him of CCW and domestic violence.

The defendant appealed, arguing that the trial court erred by instructing the jury that self-defense was not an affirmative defense to a charge of CCW and that his trial counsel was ineffective by failing to object to the

instruction. The Court of Appeals affirmed and held that self-defense is not a defense to a CCW charge, reasoning that a defendant's purpose for concealing a weapon is irrelevant, and therefore a self-defense purpose for using the weapon is not a defense to a CCW charge.[1] The defendant sought leave to appeal in this Court.

II. ANALYSIS

The defendant was charged and convicted of CCW under MCL 750.227(1), which provides:

> A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or *any other dangerous weapon*, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person. [MCL 750.227(1) (emphasis added).]

The defendant was not alleged to have possessed any of the weapons specifically identified in the statute; instead, the prosecution had to prove that the utility knife carried by defendant was an "other dangerous weapon."

We first addressed the characteristics of an "other dangerous weapon" in *People v Goolsby*, 284 Mich 375; 279 NW 867 (1938), in the context of our felonious assault statute.[2] We held that the statute penalized a

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[1] *People v Triplett*, 309 Mich App 252; 870 NW2d 333 (2015).

[2] The statute at that time defined felonious assault as follows:

> Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon, but without intending to commit the crime of murder,

felonious assault by use of dangerous weapons per se, which "carry their dangerous character because so designed and are, when employed, *per se*, deadly," as well as "other instrumentalities [that] are not dangerous weapons unless turned to such purpose." *Id*. at 378. We explained that the test to determine if an instrument is an "other dangerous weapon" is "whether the instrumentality was used as a weapon and, when so employed in an assault, [was] dangerous." *Id*. We later extended this definition of "other dangerous weapon" to the CCW statute at issue in this case in *People v Vaines*, 310 Mich 500, 506; 17 NW2d 729 (1945), explaining:

> We are convinced that the legislature intended the words "other dangerous weapon," as used in section 227, to mean any concealed article or instrument which the carrier used, or carried for the purpose of using, as a weapon for bodily assault or defense. The legislature certainly did not intend to include as a dangerous weapon the ordinary type of jackknife commonly carried by many people, unless there was evidence establishing that it was used, or was carried for the purpose of use, as a weapon.[3]

It follows from *Vaines* that to convict an individual for violating MCL 750.227(1) for carrying an instrument that is not a dangerous weapon per se, the evidence must show that a defendant used the instrument, or was carrying the instrument for the purpose of use, as a weapon. *Id*.

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and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a felony.

[3] We recognize that *Vaines* interpreted "other dangerous weapon" to mean "any concealed article or instrument which the carrier *used,* or *carried for the purpose of using,* as a weapon," 310 Mich at 506 (emphasis added), while MCL 750.227(1) does not refer to "use" and refers only to whether the instrument was "carr[ied]." Because defendant does not ask us to consider whether *Vaines* correctly interpreted that aspect of the statute, we decline to do so sua sponte.

The parties do not dispute that the defendant was charged with CCW under MCL 750.227(1) for possessing an instrument that was an "other dangerous weapon" only because it was used as a weapon. Likewise, there is no dispute that, absent a viable affirmative defense, the evidence supported the defendant's conviction for CCW; the defendant concedes that he used the utility knife as a weapon but insists that his use was justified. As a general matter, a defendant who asserts the affirmative defense of self-defense "admits the crime but seeks to excuse or justify its commission." *People v Dupree*, 486 Mich 693, 704 n 11; 788 NW2d 399 (2010).

We have not explicitly addressed whether an individual charged with CCW can assert the common-law affirmative defense of self-defense to justify his or her carrying of an instrument that becomes a dangerous weapon when he or she uses it as such. And MCL 750.227 does not address whether the common-law affirmative defense of self-defense is available for the crime of CCW. But the absence of a clear statutory recognition of the defense does not necessarily bar a defendant from relying on the defense to justify his violation of the statute. See *Dupree*, 486 Mich at 705. To the contrary, in *Dupree*, we clearly held that self-defense was an available affirmative defense to a felon-in-possession charge under MCL 750.224f when the felon's temporary possession of a firearm was the result of an attempt to repel an imminent threat. *Id*. at 706. We did not read that statute's silence as to self-defense to indicate a legislative intent to make the defense unavailable; rather, we concluded that "[a]bsent some clear indication" in the statute that the Legislature abrogated the firmly embedded common-law affirmative defense of self-defense, the defense

remains available to a defendant "if supported by sufficient evidence." *Id*. at 706.

In this case, there is no "clear indication" that the Legislature abrogated or modified the common-law affirmative defense of self-defense in the CCW statute such that defendant would be precluded from asserting it to justify his actions. Thus, we conclude that the defendant should have been allowed to present self-defense as an affirmative defense to his CCW charge. The actions that resulted in the defendant's violation of the CCW statute were the same as those that resulted in his charge of assault, which he explained were justified because he acted in lawful self-defense. Unless the prosecution disproved beyond a reasonable doubt his claim of self-defense, the defendant was justified in violating the CCW statute as well as the assault statute.

The Court of Appeals erroneously reasoned that a defendant's purpose for concealing a weapon is irrelevant to determining a defendant's guilt for violating the statute.[4] Concealing an instrument that is charged

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[4] The Court of Appeals misunderstood our holding in *People v Hernandez-Garcia*, 477 Mich 1039; 728 NW2d 406 (2007). In *Hernandez-Garcia*, we held that the affirmative defense of momentary innocent possession was not available for violating MCL 750.227(2), which prohibits the knowing possession of an unlicensed concealed firearm where the defendant disarmed a wrongful possessor of a firearm but failed to immediately turn the firearm over to the police. See *id*. at 1040. *Hernandez-Garcia* simply does not offer any guidance on whether the defense of self-defense is available to justify violating MCL 750.227(1) where the defendant's violation is based on the use or purpose for carrying an "other dangerous weapon."

Moreover, the Court of Appeals' reliance on *People v Townsel*, 13 Mich App 600; 164 NW2d 776 (1968), which held that carrying a concealed weapon for "self-protection" is not a defense to a CCW charge, was misplaced. *Townsel* is distinguishable because it does not appear that it involved a claim of self-defense.

as an "other dangerous weapon" under MCL 750.227(1) violates the statute only when a defendant in fact uses it as a weapon. See e.g., *Goolsby*, 284 Mich at 378; *Vaines*, 310 Mich at 506. Thus, a defendant's use or purpose for carrying an "other dangerous weapon" is always relevant to determining a defendant's guilt under MCL 750.227(1).

We hold, therefore, that the affirmative defense of self-defense is available to a defendant charged with violating MCL 750.227(1) when a concealed instrument becomes a dangerous weapon when the defendant uses it as such. While the defendant's utility knife became an "other dangerous weapon" under MCL 750.227(1) when he used it as a weapon, the defendant was entitled to present the affirmative defense of self-defense to justify his use of it. We conclude that the trial court's instruction that self-defense was not available to the defendant with respect to his CCW charge amounted to plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Accordingly, we reverse the judgment of the Court of Appeals, vacate the defendant's CCW conviction, and remand to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred.

LARSEN, J., took no part in the decision of this case.

PEOPLE v DUNBAR

Docket No. 150371. Argued on application for leave to appeal November 4, 2015. Decided March 29, 2016.

Charles A.-M. Dunbar was charged in the Muskegon Circuit Court with possession of cocaine, possession of marijuana, and carrying a concealed weapon in connection with items seized from his truck during a traffic stop. Defendant's truck had a towing ball attached to the rear bumper, and the police officers were unable to read one of the seven characters on the truck's registration plate because the towing ball partially obstructed their view. Surmising that the plate read either CHS 5818 or CHS 6818, one of the officers entered CHS 5818 into the Law Enforcement Information Network and discovered that it was the plate number for a different vehicle. The officers then stopped defendant after concluding that he was violating MCL 257.225(2), which provides that a vehicle's registration plate must be mounted in a place and position that is clearly visible and maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition. They smelled burned marijuana within the vehicle, leading to a search during which they found drugs and a handgun. Defendant moved to suppress the evidence of the contraband on the grounds that it was the fruit of an illegal seizure under the Fourth Amendment and Const 1963, art 1, § 11 because the officers lacked a lawful basis for stopping his vehicle. The court, Timothy G. Hicks, J., denied the motion, concluding that defendant's obstructed plate violated MCL 257.225(2) and therefore provided a lawful basis for the stop. Defendant appealed by leave granted. The Court of Appeals, SHAPIRO, J. (O'CONNELL, J., concurring and METER, P.J., dissenting), reversed. In the lead opinion, Judge SHAPIRO asserted that while the officers had difficulty reading one character on the registration plate because of the towing ball, the circumstances that the officers observed did not constitute a violation of MCL 257.225(2) because the plate itself was clean and legible and the statute does not refer to trailer hitches, towing balls, or other commonly used towing equipment. Judge O'CONNELL concurred in the result and wrote separately to state that the statute was ambiguous and unconstitutionally vague, criminalizing the use of ordinary car equipment

such as bicycle carriers, trailers, and trailer hitches. He concluded that MCL 257.225(2) required only that the plate itself be maintained free from materials that obscure the registration information and in a clearly legible condition. Judge METER dissented and contended that defendant's obstructed registration plate provided a lawful basis to stop him. 306 Mich App 562 (2014). The prosecution sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant leave or take other action. 497 Mich 978 (2015).

In a unanimous opinion by Justice MARKMAN, the Supreme Court *held*:

Defendant violated MCL 257.225(2) because the attached towing ball partially obstructed the police officers' view of the truck's plate. The officers therefore had a lawful basis for stopping defendant's vehicle and, after smelling marijuana within it, lawfully discovered the contraband. The trial court correctly denied defendant's motion to suppress. MCL 257.225(2) regulates the placement and condition of registration plates. The second sentence of that subsection requires that the plate be attached at no less than a specific height on the vehicle and in a place and position that is clearly visible. The third sentence of the subsection requires that the plate be maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition. The Court of Appeals panel examined the wrong part of the statute in concluding that defendant did not violate MCL 257.225(2). Rather than analyzing whether defendant violated the clear-visibility requirement of the subsection's second sentence, the panel analyzed only whether he violated the subsection's third sentence, concluding that there was no evidence indicating that defendant's plate had not been maintained in legible condition. This case, however, concerns the second sentence of the subsection, which directs that a registration plate must be attached in a place and position that is clearly visible. It requires that the registration plate be attached where it can be seen without obstruction. Under it, a person must configure his or her vehicle's registration plate and surrounding attachments in a manner that ensures that the plate is not partially or fully obstructed. The statute therefore prohibits obstruction of a registration plate by an object attached to a vehicle. Even if the Court of Appeals panel correctly concluded that the plate was clearly legible under the third sentence of MCL 257.225(2), the statute's second and third sentences impose separate and distinct duties. One can comply with the third sentence by maintaining a legible plate yet still violate the second sentence by failing to attach that legible plate in

a place and position that is clearly visible. The Court of Appeals panel erred by failing to consider whether defendant violated the subsection's second sentence.

Court of Appeals' judgment reversed, trial court's denial of motion to suppress reinstated, and case remanded to the trial court for further proceedings.

MOTOR VEHICLES — REGISTRATION PLATES — OBSTRUCTIONS.

MCL 257.225(2) regulates the placement and condition of vehicle registration plates; the statute requires both that the plate be attached at no less than a specific height on the vehicle and in a place and position that is clearly visible and that the plate be maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition; a person must configure his or her vehicle's registration plate and surrounding attachments in a manner that ensures that the plate is not partially or fully obstructed; the statute prohibits obstruction of a registration plate by an object attached to a vehicle, for example, a bumper-mounted towing ball; accordingly, even if a person maintains a plate free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition, he or she could still violate MCL 257.225(2) by failing to attach the plate in a place and position that is clearly visible.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Oakes Law Group PLLC (by *Michael L. Oakes*) for defendant.

Amici Curiae:

Victor Fitz, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Helton Law, PLLC (by *Steven D. Helton*), and *Bradley R. Hall* for Criminal Defense Attorneys of Michigan.

MARKMAN, J. This case arises from a traffic stop of defendant made after police officers observed that his vehicle's registration plate was partially obstructed by a bumper-mounted towing ball, a civil infraction under MCL 257.225(2) and (7). During this stop, the officers smelled burnt marijuana within the vehicle, leading to a search of the vehicle during which they discovered contraband, including marijuana, cocaine, and a handgun. Defendant subsequently moved in the trial court to suppress that contraband as the fruit of an illegal seizure because, according to defendant, the officers lacked a lawful basis on which to stop his vehicle. The trial court denied defendant's motion, concluding that his obstructed plate violated MCL 257.225(2) and therefore provided a lawful basis on which to stop his vehicle. The Court of Appeals, however, concluded that MCL 257.225(2) does not prohibit the obstruction of a registration plate by a towing ball and reversed. We respectfully disagree with the Court of Appeals and reverse its judgment. For the reasons set forth below, we conclude that defendant violated MCL 257.225(2) and therefore that the police officers had a lawful basis on which to stop him. The trial court accordingly was correct to deny defendant's motion to suppress.

I. FACTS AND HISTORY

In the early morning of October 12, 2012, defendant was driving his Ford Ranger pickup truck on West Hackley Avenue in Muskegon Heights. Muskegon County Sheriff Deputies James Ottinger and Jason Van Andel were on a routine patrol and started following defendant. Ottinger testified that the officers' decision to follow defendant was not based on any particular suspicious activity. They nonetheless decided to check his truck's registration plate against the Law

Enforcement Information Network (LEIN), a statewide computerized information system, which, according to Ottinger, is commonly done on patrol. According to Van Andel, a towing ball on the truck's bumper partially obstructed his view of the truck's registration plate; however, from his vantage point, the officer surmised that the plate read either CHS 5818 or CHS 6818. He entered CHS 5818 into LEIN, which returned as the registration-plate number for a 2007 Chevrolet Equinox rather than a Ford Ranger. Both officers testified that they decided to stop defendant for having an obstructed registration plate.[1] The officers then turned on their overhead lights, and defendant promptly pulled over.

The officers approached defendant's pickup truck and could then see that the plate read CHS 6818 rather than CHS 5818. While talking with defendant, the officers smelled burnt marijuana coming from the vehicle. A vehicle search revealed contraband, including marijuana, cocaine, and a handgun, leading to defendant's being criminally charged with possession of cocaine, possession of marijuana, and carrying a concealed weapon.[2]

In the trial court, defendant moved to suppress the contraband. He argued that he had been unlawfully seized under the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution because the officers lacked a "reasonable suspicion" of an offense supporting the traffic stop. Therefore, he proceeded to argue, the ensuing discov-

[1] When asked why he had not attempted to enter CHS 6818 into LEIN, Van Andel testified merely that the decision to stop defendant was made upon learning that CHS 5818 was associated with a 2007 Chevrolet Equinox.

[2] The vehicle search itself has not been challenged.

ery of contraband had been the fruit of an illegal seizure. Following a hearing, the trial court determined that the towing ball on defendant's truck had obstructed the officers' view of the truck's registration plate and thus concluded that the stop had been properly grounded on defendant's violation of MCL 257.225(2). Accordingly, it denied defendant's motion to suppress.

The Court of Appeals granted defendant's motion for interlocutory appeal and reversed in a split decision. *People v Dunbar*, 306 Mich App 562; 857 NW2d 280 (2014). In the lead opinion, Judge SHAPIRO asserted that while the officers "had difficulty reading one of the seven characters on the pickup's license plate due to the presence of a trailer towing ball attached to the rear bumper," "the circumstances observed by the officers did not constitute a violation" of MCL 257.225(2) because the plate *itself* was clean and legible and the "statute makes no reference to trailer hitches, towing balls, or other commonly used towing equipment . . . ." *Id*. at 565-566 (opinion by SHAPIRO, J.). Judge O'CONNELL concurred in the result and wrote separately to state that the statute is "ambiguous" and "unconstitutionally vague" because it "casts a net so wide that it could be construed to make ordinary car equipment illegal, including equipment like bicycle carriers, trailers, and trailer hitches." *Id*. at 566-567 (opinion by O'CONNELL, J.). He thus read MCL 257.225(2) "to require only that the *license plate itself* be maintained free from materials that obscure the registration information and that the *plate itself* be in a clearly legible condition." *Id*. at 567. Judge METER dissented and contended that defendant's obstructed registration plate provided the officers with a lawful basis on which to stop defendant. *Id*. at 569-570 (opinion by METER, P.J.).

The prosecutor applied in this Court for leave to appeal, and we ordered under MCR 7.302(H)(1) that oral argument be held to address whether to grant leave or take other action. *People v Dunbar*, 497 Mich 978 (2015). The parties were directed to brief "whether the license plate affixed to the defendant's vehicle violated MCL 257.225(2) where it was obstructed by a towing ball, thereby permitting law enforcement officers to conduct a traffic stop of the defendant's vehicle." *Id*. We heard oral argument on November 4, 2015, and now consider the prosecutor's application. In lieu of granting leave to appeal, we reverse the Court of Appeals' judgment.

II. STANDARD OF REVIEW

In considering a trial court's ruling on a motion to suppress, we review its factual findings for clear error and its interpretation of the law de novo. *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014).

III. ANALYSIS

We review here the Court of Appeals' determination that defendant did not violate MCL 257.225(2) when his truck's registration plate was partially obstructed by a towing ball. If defendant violated this statute, the ensuing traffic stop was lawful. See MCL 257.742(1) ("A police officer who witnesses a person violating [the Michigan Vehicle Code, MCL 257.1 through MCL 257.923] . . . , which violation is a civil infraction, may stop [and temporarily] detain the person . . . ."); MCL 257.225(7) ("A person who violates this section is responsible for a civil infraction."); see also *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996) ("[T]he decision to stop an automobile

is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

When interpreting a statute, we seek "to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). We "give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015). We interpret the text "according to the common and approved usage of the language." MCL 8.3a. Unless we conclude that the statute is ambiguous, the Legislature is "presumed to have intended the meaning expressed" in the statute. *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012). A clear and unambiguous statute "must be enforced as written and no further judicial construction is permitted." *Gardner v Dep't of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015).

The provision of the statute at issue, MCL 257.225(2), regulates the placement and condition of registration plates:

> A registration plate shall at all times be securely fastened in a horizontal position to the vehicle for which the plate is issued so as to prevent the plate from swinging. The plate shall be attached at a height of not less than 12 inches from the ground, measured from the bottom of the plate, in a place and position which is clearly visible. The plate shall be maintained free from foreign materials that obscure or partially obscure the registration information, and in a clearly legible condition.[3]

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[3] As amended by 1995 PA 129. Following the events giving rise to this case, the Legislature enacted 2014 PA 26, which amended MCL 257.225(2) by substituting "that" for "which" in the second sentence and

This case concerns the second sentence of the provision, which directs that a registration plate "shall be attached . . . in a place and position which is clearly visible."[4] The phrase "place and position" indicates that this sentence governs the location of the registration plate on a vehicle. This location must be "clearly visible," meaning that the location where the plate is attached—and after attachment the plate itself[5]—can be viewed without obstruction.[6] MCL 257.225(2) accordingly and simply requires that the registration plate be attached where it can be seen without obstruction.[7]

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striking the comma after "information" in the third sentence. Neither change affects our interpretation of the statute.

[4] The first sentence of MCL 257.225(2) is not implicated in this case because there is no evidence that the truck's registration plate was not "securely fastened in a horizontal position." Because we ultimately conclude that defendant violated the subsection's second sentence, we need not decide whether he also violated its third sentence. Nonetheless, even if we assume that there was no such violation, it would not affect our determination that the second sentence was violated and therefore that the officers had probable cause to stop defendant's vehicle.

[5] Defendant argues that MCL 257.225(2) requires the clear visibility of the registration plate's "*place and position*" (i.e., its location) rather than expressly requiring the clear visibility of the *plate*. Nonetheless, because the plate is a thin sheet of metal, we see no effective distinction between the plate's location and the plate itself or between the visibility of the plate's location and the visibility of the plate itself.

[6] We note that this interpretation accords with the definitions in *Merriam-Webster's Collegiate Dictionary* (11th ed) (stating that "clearly" means "in a clear manner," which, incorporating the definition of "clear," means in a manner "free from obstruction," and that "visible" means "capable of being seen").

[7] We interpret MCL 257.225(2) using the language of the statute. We note, however, that our interpretation accords with a reasonable view of the Legislature's police power: requiring registration plates to be unobstructed certainly advances public safety by permitting witnesses to a hit-and-run motor-vehicle accident or police officers engaged in the investigation of criminal flight to observe the registration information of a fleeing vehicle or by enabling officers effecting a traffic stop to determine whether a driver has a violent criminal history posing some threat.

Defendant argues that a clear-visibility requirement would be "absurd" if it imposed liability for an obstructing object (e.g., a building or pedestrian) or condition (e.g., snow or fog) outside a driver's control. We note, however, that the instant violation was based not on an object or condition outside defendant's control but on an object fully within his control—namely, a towing ball attached to his rear bumper. But in any event, defendant's concern is misplaced; nothing in MCL 257.225(2) evinces the Legislature's intention to impose liability on a person on the basis of conduct or circumstances outside his or her control. Instead, the statute requires a registration plate to "be attached . . . in a place and position which is clearly visible." MCL 257.225(2). These words evince no intention to require any person to do anything other than configure his or her vehicle's registration plate and surrounding attachments in a manner that ensures the unobstructed visibility of the plate.[8]

The Court of Appeals panel, in concluding that defendant did not violate MCL 257.225(2), examined the wrong part of the subsection. Rather than analyzing whether defendant violated the clear-visibility requirement of the subsection's *second* sentence, the lead opinion and the concurring opinion analyzed only whether he violated the subsection's *third* sentence, which requires that a registration plate "be maintained free from foreign materials that obscure or partially obscure the registration information, and in a clearly legible condition." MCL 257.225(2). Focusing on

[8] We do not decide today whether MCL 257.225(2) is violated when a trailer hitch is, in fact, being used to tow a trailer and the *combination* of the hitch and the trailer obstructs the registration plate. We note that trailers are permitted under the statutory scheme, see MCL 257.721, and that trailers generally must have their own registration plates, see MCL 257.73; MCL 257.216; MCL 257.225.

whether the plate was "legible," the lead opinion concluded that there was "no evidence that defendant's plate was dirty, rusted, defaced, scratched, snow-covered, or otherwise not 'maintained' in legible condition." *Dunbar*, 306 Mich App at 566 (opinion by SHAPIRO, J.). The concurring opinion apparently agreed with this conclusion. See *id*. at 567 (opinion by O'CONNELL, J.). A majority of the panel therefore concluded that defendant had not violated the statute.

But even if the panel correctly concluded that the plate was "clearly legible" under the third sentence of MCL 257.225(2), it failed altogether to consider whether the plate was "clearly visible" under that subsection's second sentence. These two sentences impose separate and distinct duties: the second sentence, by requiring that the plate be "clearly visible," requires that the plate be attached where it will not be obstructed, and the third sentence requires that the plate itself "be maintained free from foreign materials that obscure or partially obscure the registration information, and in a clearly legible condition." Quite clearly, the third sentence concerns an ongoing duty to *maintain* the plate so that it can be *read*, that is, to ensure that no foreign materials adhere to the plate and thus obscure the plate and registration information. Because one can comply with the third sentence by maintaining a legible plate yet still violate the second sentence by failing to attach the plate, legible though it may be, "in a place and position which is clearly visible," the panel's analysis was incomplete for not having considered whether defendant violated the second sentence.

Having concluded that MCL 257.225(2) requires that a vehicle's registration plate be attached where it can be seen without obstruction, we apply that under-

standing of the statute to the instant case to determine whether defendant violated the statute. The trial court found, on the basis of the testimony of the officers and pictures taken during the traffic stop, that the officers' view of the truck's plate was obstructed by the attached towing ball. Indeed, that finding is not challenged. Because MCL 257.225(2) prohibits an obstruction of a vehicle's registration plate, defendant violated the statute. The officers' stop of defendant thus was lawful, and the trial court properly denied defendant's motion to suppress.[9]

IV. OBSERVATIONS

As this case demonstrates, a towing ball, when attached to a vehicle in a way that obstructs a view of the vehicle's registration plate, may subject a driver to a police stop, including the possibility of a citation and, if circumstances warrant, a search, seizure, or both. We are cognizant that Michiganders' vehicles commonly have items such as trailer hitches and bicycle racks attached to them, and we accordingly recognize that under MCL 257.225(2) common conduct may lead to what some might consider harsh consequences.

But the potentially broad reach of a statute by itself does not invest a judicial body with the authority either to revise that statute or to interpret it in a manner inconsistent with its language. We do not sit as

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[9] The prosecutor argues in the alternative that even if the officers misinterpreted MCL 257.225(2), their stop of defendant (and their ensuing discovery of contraband) was nonetheless lawful because, under *Heien v North Carolina*, 574 US ___; 135 S Ct 530, 536; 190 L Ed 2d 475 (2014), a police officer's reasonable suspicion supporting a traffic stop may rest on a "reasonable mistake of law." Because we conclude that defendant violated MCL 257.225(2), we necessarily also conclude that the officers did not make a mistake of law, reasonable or otherwise, and therefore *Heien* is not pertinent.

the "legislators in chief" of this state in order to correct statutes that may be viewed by some (or even by many) as "cumbersome," "impractical," or "inadequately precise." See *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 163-164; 680 NW2d 840 (2004). Rather, the language of MCL 257.225(2) "compels a particular result," *id*. at 164, and those desiring to alter this result must seek to do so "through those bodies authorized by our Constitution to undertake such decisions—typically the legislative branch," *AFT Mich v Michigan*, 497 Mich 197, 215; 866 NW2d 782 (2015).

We further note that MCL 257.225(2) is not rendered "ambiguous" or "vague" merely because "the statute casts a net so wide that it could be construed to make ordinary car equipment illegal." *Dunbar*, 306 Mich App at 566 (opinion by O'CONNELL, J.). One may observe, for example, from common experience that many drivers on Michigan roads exceed speed limits, but we would not conclude from that observation alone that speed-limit laws are unenforceable, let alone "ambiguous" or "vague." If the Legislature possesses the constitutional authority to enact a statute regulating the placement of registration plates, then it may do so regardless of the number of persons affected by the statute's enforcement.[10] Accordingly, when the people wish to argue "that a statute is unwise or results in bad policy," those arguments "should be addressed to the Legislature." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 613; 575 NW2d 751 (1998) (quotation marks and citation omitted). This Court is simply not authorized to alter the

[10] See, e.g., *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015) ("[T]he legislative authority of the state 'can do anything which it is not prohibited from doing by the people through the Constitution of the State or the [Constitution of the] United States.' ") (citation omitted).

meaning of MCL 257.225(2) on the ground that it might potentially encompass common conduct, and we accordingly decline to do so.

V. CONCLUSION

We conclude that the second sentence of MCL 257.225(2) requires a vehicle's registration plate and surrounding attachments to be configured in such a manner that the plate is not partially or fully obstructed. The statute therefore prohibits a registration plate from being obstructed by an object attached to a vehicle. We further conclude that defendant violated MCL 257.225(2) because the towing ball attached to his truck partially obstructed the truck's registration plate from the view of police officers following him. The officers thus lawfully stopped defendant and, after smelling burnt marijuana from within the vehicle, lawfully discovered contraband. In lieu of granting leave to appeal, we reverse the Court of Appeals' judgment, reinstate the trial court's denial of defendant's motion to suppress the contraband, and remand this case to the trial court for further proceedings.

YOUNG, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MARKMAN, J.

BANK OF AMERICA, NA v FIRST AMERICAN TITLE INSURANCE COMPANY

Docket No. 149599. Argued October 15, 2015 (Calendar No. 7). Decided April 13, 2016.

Bank of America brought an action in the Oakland Circuit Court against First American Title Insurance Company, Westminster Abstract Company, and others, alleging breach of contract and negligent misrepresentation in connection with mortgages that plaintiff had partially financed on four properties whose value had been fraudulently inflated and whose purchasers were straw buyers who had been paid for their participation. Shortly after closing, all four borrowers defaulted. Plaintiff foreclosed by advertisement and subsequently bought all four properties at sheriff sales. Two of the purchases were by full credit bids, which are bids in the full amount of the unpaid principal and interest plus foreclosure costs. Plaintiff then sold the properties to bona fide purchasers at what it asserted was a loss of approximately $7 million. After discovering the underlying fraud in the four loans during the foreclosure proceedings, plaintiff sued, among others, First American, which had issued closing protection letters (CPLs) that promised to reimburse plaintiff for actual losses incurred in connection with the closings if the losses arose from fraud or dishonesty, and Westminster, alleging that it had violated the terms of the closing instructions. The other defendants either defaulted or were dismissed. The court, Denise Langford Morris, J., granted the remaining defendants' motion for summary disposition of plaintiff's breach of contract claims under MCR 2.116(C)(10) after plaintiff voluntarily dismissed its negligent misrepresentation claim. On appeal, the Court of Appeals, MARKEY and RIORDAN, JJ. (MURPHY, C.J., concurring in part and dissenting in part), affirmed with respect to Westminster and reversed in part with respect to First American in an unpublished opinion per curiam, issued March 27, 2014 (Docket No. 307756). The Court of Appeals held that plaintiff's claim against First American relating to the properties on which it had made full credit bids was barred by *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63 (2008), which held that when a mortgagee takes title to property pursuant to a full credit bid, the mortgage debt is

satisfied and the mortgage is extinguished, precluding the mortgagee from later claiming that the property was worth less than the bid. With respect to First American's liability on the other two closings, the Court of Appeals concluded that the trial court properly granted summary disposition to First American and Westminster because plaintiff had failed to produce evidence that created a question of fact regarding whether Westminster knew of or participated in the underlying fraud in those closings. Finally, the Court of Appeals concluded that plaintiff had not established a link between Westminster's alleged violations of the closing instructions and the claimed damages and, even if a link had been established, there were no damages because of plaintiff's full credit bid at the foreclosure sale. The Supreme Court granted plaintiff's application for leave to appeal. 497 Mich 896 (2014).

In a unanimous opinion by Justice VIVIANO, the Supreme Court *held*:

The Court of Appeals erred by concluding that plaintiff's full credit bids barred its contract claims against the nonborrower third-party defendants. To the extent that *New Freedom* held that the full credit bid rule barred contract claims brought by a mortgagee against nonborrower third parties, it was overruled. Further, the closing instructions agreed to by plaintiff and Westminster constituted a contract upon which a breach of contract claim could be brought. Finally, the lower courts erred by relying on *New Freedom* to interpret the CPLs given that the terms of the letters in *New Freedom* differed materially from the ones at issue.

1. The Court of Appeals erred by holding that the full credit bid rule barred plaintiff's claims against Westminster and First American. The Court of Appeals relied on *New Freedom*, which held that when a mortgagee makes a full credit bid that results in the acquisition of the property, the mortgagee is precluded from later claiming that the property is actually worth less than the bid for purposes of collecting its debt. Although the full credit bid rule was not a creature of statute, it bore a relationship to the foreclosure by advertisement and anti-deficiency statutes, which were designed to govern the relationship between, and establish the rights and liabilities of, the mortgagee and mortgagor, not nonborrower third parties. There was no apparent justification for extending the protections of the full credit bid rule to alter the contractual rights and liabilities between a mortgagee and nonborrower third parties. Accordingly, the full credit bid rule did not

bar contract claims by a mortgagee against nonborrower third parties, and *New Freedom* was overruled to the extent that it held otherwise.

2. The closing instructions agreed to by plaintiff and Westminster constituted contracts upon which a breach of contract action could lie. The closing instructions required Westminster to contact plaintiff immediately if it could not comply with the instructions and specified that Westminster, as the closing agent, was financially liable for any loss resulting from its failure to follow the instructions. Any alterations or amendments to the instructions had to be in writing and faxed with a confirmation receipt, and any changes approved by plaintiff had to be initialed by all signatories. In addition, plaintiff had to approve the HUD-1 settlement statement before closing. A valid contract requires (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The parties did not dispute that they were competent to contract or that loan closings were a proper subject matter for a contract. Westminster received a fee in exchange for handling the closings, thus satisfying the consideration requirement. There was also mutuality of agreement and mutuality of obligation. Plaintiff submitted the closing instructions to Westminster, and Westminster agreed to the closing instructions by performing the closings for plaintiff. Further, Westminster acknowledged that it understood its obligations under the closing instructions and agreed to perform those obligations. As a result, the closing instructions satisfied all of the elements of a valid contract.

3. The Court of Appeals erred to the extent it concluded that the contracts between plaintiff and Westminster were modified by the CPLs between plaintiff and First American because Westminster was not a party to the CPLs and because plaintiff and Westminster did not mutually agree to modify the obligations under the closing instructions. Although parties to a contract are at liberty to modify or waive the rights and duties established by a contract by mutual agreement, a party cannot unilaterally alter an existing bilateral agreement. Nothing in the contract purported to limit or modify Westminster's duties as the closing agent. Instead, the contract merely provided the limitations on First American's agreement to indemnify plaintiff for any errors arising from the closing on behalf of the closing agent, which was Westminster. The Court of Appeals' analysis of this issue was vacated, and the case was remanded to the trial court for it to reconsider

whether summary disposition under MCR 2.116(C)(10) was appropriate as to plaintiff's claim for breach of contract against Westminster.

4. The trial court and the Court of Appeals majority erred by imposing additional requirements on plaintiff that were not found in the plain language of the parties' CPLs. A CPL is a contract between the title company and the lender whereby the title company agrees to indemnify the lender for any losses caused by the failure of the title agent to follow the lender's closing instructions. Under the CPLs in the instant case, First American agreed to reimburse plaintiff for actual losses plaintiff incurred in connection with the specified closings when conducted by an agent authorized to issue title insurance for the company when the loss arose out of fraud or dishonesty of the issuing agent handling plaintiff's funds or documents in connection with the closings. Plaintiff asserted that First American was liable under this section for the fraud and dishonesty of Westminster and of Patriot Title Agency, which handled two of the four closings at issue. In order for First American to be liable under the CPLs, plaintiff must establish that it suffered actual losses arising out of the fraud or dishonesty of Westminster and Patriot in connection with the closings. The common meaning of "dishonesty" is the opposite of "honesty"; it is a disposition to lie, cheat, or steal, or a dishonest act or fraud. The plain meaning of the word "fraud" includes both actual fraud, which is an intentional perversion of the truth, and constructive fraud, which is an act of deception or a misrepresentation without an evil intent. Fraud may also be committed by suppressing facts under circumstances that establish a legal duty to make full disclosure, such as when a party has expressed to another some particularized concern or made a direct inquiry. In this case, the lower courts erred by concluding that plaintiff was required to present evidence of concealed disbursements, shortages, or unpaid prior lien holders and that First American, as a matter of law, could not be liable based on the fraud or dishonesty of Westminster and Patriot in the handling of a HUD-1 settlement statement. The case was remanded to the trial court for reconsideration of whether genuine issues of material fact remained regarding plaintiff's actual losses arising from the fraud or dishonesty of Westminster and Patriot in connection with the closings.

5. The trial court and Court of Appeals majority erred by relying on *New Freedom* to interpret the CPLs. The title insurer in *New Freedom* was liable for the actual losses arising out of the

fraud or dishonesty of the issuing agent *in* handling the funds or documents in connection with the closings, whereas the CPLs at issue provided that First American was liable for actual losses arising out of fraud or dishonesty of the issuing agent handling the funds or documents in connection with the closings. The inclusion of the word "in" in the CPLs in *New Freedom* defined, and effectively restricted, the types or categories of fraudulent or dishonest activities by a closing agent that could give rise to a right to indemnification, limiting them to conduct associated with handling the mortgage company's funds or documents. The fact that the word "in" was not included in the CPLs at issue means that the phrase simply defined or identified the closing agent, effectively broadening the indemnification coverage to any acts of fraud or dishonesty by the closing agent related to a closing. In light of this distinction, the fraud or dishonesty by Westminster or Patriot need not have been tied to their handling of plaintiff's funds or documents. As a result, plaintiff may offer evidence that Westminster and Patriot engaged in fraud or dishonesty in the handling of the HUD-1 settlement statements at closing, regardless of whether those documents belonged to plaintiff. The case was remanded to the trial court for reconsideration of whether summary disposition in favor of First American regarding its liability under the CPLs was appropriate.

Court of Appeals judgment reversed; case remanded to the trial court for reconsideration of whether summary disposition under MCR 2.116(C)(10) was appropriate.

1. MORTGAGES — FORECLOSURES — FULL CREDIT BIDS — BREACH OF CONTRACT BY NONBORROWER THIRD PARTIES.

A mortgagee who takes title to property at a foreclosure sale pursuant to a full credit bid is not barred from pursuing a claim for breach of contract against a nonborrower third party.

2. MORTGAGES — CLOSING INSTRUCTIONS — BREACH OF CONTRACT ACTIONS.

The closing instructions agreed to by a mortgagee and a closing agent may constitute a contract on which a breach of contract action could lie provided the instructions meet the five elements of a valid contract, which are parties that are competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.

3. MORTGAGES — CLOSING PROTECTION LETTERS — FRAUD AND DISHONESTY — DEFINITIONS.

For purposes of interpreting a closing protection letter in which an

> insurance company agrees to indemnify a mortgage lender for losses arising out of fraud or dishonesty of the issuing agent, the word "dishonesty" means a disposition to lie, cheat, or steal, or a dishonest act or fraud, and the word "fraud" includes both actual fraud, which is an intentional perversion of the truth, and constructive fraud, which is an act of deception or a misrepresentation without an evil intent; fraud may also be committed by suppressing facts under circumstances that establish a legal duty to make a full disclosure, such as when a party has expressed to another some particularized concern or made a direct inquiry.

RJ Landau Partners PLLC (by *Richard J. Landau* and *Christopher A. Merritt*) for Bank of America.

Brooks Wilkins Sharkey & Turco, PLLC (by *Steven M. Ribiat*), for First American Title Insurance Company.

Ottenwess, Taweel & Schenk, PLC (by *John R. Monnich*), for Westminster Abstract Company.

Amici Curiae:

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *Rodney D. Martin*) for the Michigan Bankers Association.

Smith Appellate Law Firm PLLC (by *Michael F. Smith*) for the American Land Title Association.

VIVIANO, J. In this case, we are asked to address, among other things, the scope of the full credit bid rule. Plaintiff has asserted a variety of claims against certain entities and individuals involved in various allegedly fraudulent mortgage transactions. The Oakland Circuit Court granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants as to all claims. The Court of Appeals affirmed in part and reversed in part, relying on the full credit bid rule as

discussed in *New Freedom Mtg Corp v Globe Mtg Corp*[1] to conclude that certain claims raised by plaintiff were barred by plaintiff's full credit bids at the foreclosure sales.

For the reasons stated below, we conclude that the *New Freedom* panel erred to the extent it held that the full credit bid rule bars contract claims against nonborrower third parties, such as defendants in this case. Therefore, the Court of Appeals in the instant case erred by concluding that plaintiff's full credit bids barred its contract claims against the nonborrower third-party defendants. As to the other claims at issue in this appeal, we conclude that closing instructions constitute a contract upon which a breach of contract claim can be brought, and we remand to the trial court for reconsideration of whether summary disposition is appropriate on this claim. We also conclude that the lower courts erroneously interpreted the parties' closing protection letters and therefore remand to the trial court to reconsider whether summary disposition is appropriate as to plaintiff's claim under the parameters set forth in this opinion. In sum, we reverse the judgment of the Court of Appeals and remand to the Oakland Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 2005 and 2006, an independent mortgage broker submitted four loan packages to plaintiff Bank of America, NA. Bank of America agreed to finance a percentage of the borrowers' purchases of the properties. After issuing the loan commitments, Bank of

[1] *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63; 761 NW2d 832 (2008).

America sent closing instructions to two closing agents, defendants Westminster Abstract Company (Westminster) and Patriot Title Agency (Patriot). Those closing agents agreed to close the four loans in exchange for a fee.

The closing instructions required that a closing protection letter (CPL) be issued in connection with each closing. Defendant First American Title Insurance Co (First American) was the title insurance company for all four sales and agreed to issue CPLs for all four closings. Under the CPLs, First American agreed to reimburse Bank of America for its actual losses incurred in connection with the closing if the losses arose out of, among other things, the fraud or dishonesty of the closing agents.

After First American issued the CPLs, the closings occurred. Westminster closed on loans for two of the properties: 13232 Enid Boulevard (Enid), for which Bank of America provided a $3,575,000 loan; and 1890 Heron Ridge Court (Heron Ridge), for which Bank of America provided a $2,800,000 loan. Patriot closed on loans for the other two properties: 1766 Golf Ridge Drive (Golf Ridge), for which Bank of America provided a $1,500,000 loan; and 1550 Kirkway Road (Kirkway), for which Bank of America provided a $1,500,000 loan. Unbeknownst to Bank of America, the values of the properties had been inflated by fraudulent appraisals and straw buyers who were paid for their participation. Shortly after closing, all four borrowers defaulted.

Bank of America foreclosed by advertisement on all four properties in accordance with Michigan's foreclosure statutes.[2] It subsequently purchased all four properties at sheriff sales with credit bids. It made full

[2] MCL 600.3201 *et seq*.

credit bids—i.e., credit bids in the full amount of the unpaid principal and interest plus foreclosure costs—on the Enid and Kirkway properties. Thereafter, Bank of America sold all the properties to bona fide purchasers.[3] Bank of America claims it lost roughly $7 million on the deals.

During the foreclosure proceedings, Bank of America discovered the underlying fraud in each of the four loans. Bank of America brought the instant suit against First American, Westminster, and Patriot, as well as several individuals involved in the closings.[4] Pertinent to this appeal, Bank of America asserted a claim against Westminster, alleging that it violated the specific terms of the closing instructions, and a claim against First American for recovery under the CPLs for the actual losses arising from Westminster's and Patriot's fraud and dishonesty during the closings.[5]

Defendants moved for summary disposition. The circuit court granted First American and Westminster summary disposition under MCR 2.116(C)(10) as to all claims and thereafter denied Bank of America's motion for reconsideration.

In a split, unpublished opinion, the Court of Appeals affirmed in part and reversed in part.[6] The majority found *New Freedom* controlling. Quoting *New Freedom*, the panel defined the full credit bid rule as follows:

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[3] Bank of America sold Enid for $632,500, Heron Ridge for $1,150,000, Golf Ridge for $325,000, and Kirkway for $440,000.

[4] Patriot and all other defendants except Westminster and First American have either been defaulted or dismissed from the action.

[5] Bank of America also raised a negligent misrepresentation claim against Westminster, but subsequently voluntarily dismissed it.

[6] *Bank of America, NA v First American Title Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2014 (Docket No. 307756).

> "When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a 'full credit bid.' When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished."[7]

Although the majority appeared to question the validity of *New Freedom*, it concluded that *New Freedom* extended the full credit bid rule to indemnity claims under CPLs. The majority first considered First American's liability under the CPLs for the closings done by Patriot. The majority concluded that genuine issues of material fact remained as to whether Patriot engaged in fraud or dishonesty at the Golf Ridge and Kirkway closings. Nonetheless, it affirmed the trial court's order granting summary disposition in favor of First American as to the claim based on the Kirkway closing. Recognizing that Bank of America made a full credit bid on the Kirkway property, the majority held that the full credit bid rule barred Bank of America's claim against First American stemming from the closing on that property.[8] The majority then turned to First American's liability regarding the Westminster closings. The majority concluded that Bank of America failed to produce evidence to create a question of fact as to whether Westminster knew of or participated in the underlying fraud in the closings of the Enid and Heron Ridge properties. Thus, the majority held that the trial court properly granted summary disposition to First American and Westminster. Finally, the majority considered the validity of Bank of America's contract claim

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[7] *Bank of America*, unpub op at 12, quoting *New Freedom*, 281 Mich App at 68 (citations omitted).

[8] *Id*. at 7.

against Westminster.[9] The majority concluded that Bank of America did not establish a link between Westminster's alleged violations of the closing instructions and the claimed damages. Even if the majority had concluded there was a link, it also rejected Bank of America's claim against Westminster stemming from the closing on the Enid property because there were no damages due to Bank of America's full credit bid at the foreclosure sale.[10]

Bank of America sought leave to appeal in this Court. On November 19, 2014, we granted leave to appeal and asked the parties to include among the issues briefed:

> (1) whether a separate contract between the lender and the closing agent existed outside of the closing protection letters; (2) whether there was a genuine issue of material fact regarding the closing agent's violation of the terms of the lender's written closing instructions; and (3) whether the full credit bid rule of *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63 (2008), is a correct rule of law and, if so, whether it applies to this case.[11]

II. STANDARD OF REVIEW AND INTERPRETATION PRINCIPLES

We review de novo a trial court's decision regarding

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[9] *Id*. at 15.

[10] Chief Judge MURPHY concurred in part and dissented in part. He disagreed with the majority's construction of the CPLs and its analysis regarding the two closings administered by Westminster. He further disagreed with the majority's acceptance of *New Freedom* regarding the full credit bid rule. Chief Judge MURPHY recognized that *New Freedom* required the panel to apply the full credit bid rule to the instant case, but he would have formally challenged the opinion by requesting that a conflict panel be convened. Finally, he disagreed with the majority's evaluation of Bank of America's contract claim against Westminster. *Bank of America*, unpub op at 1-5 (MURPHY, C.J., concurring in part and dissenting in part).

[11] *Bank of America, NA v First American Title Ins Co*, 497 Mich 896 (2014).

summary disposition.[12] The trial court granted summary disposition in favor of defendants Westminster and First American under MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint."[13] In resolving such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion."[14] If the evidence fails to establish a genuine issue regarding any material fact, the movant is entitled to judgment as a matter of law.[15]

We also review de novo questions of statutory interpretation and contractual interpretation.[16] To the extent this case requires the interpretation of a statute, our goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language.[17] When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.[18] No further judicial construction is required or permitted.[19] To the extent this case requires the interpretation of a contract, our primary goal in interpreting any contract is to give effect to the parties' intentions at the time they entered into the contract.[20] We determine the parties' intent by inter-

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[12] *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013).

[13] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[14] *Id*.

[15] *Id*.

[16] *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

[17] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

[18] *Id*.

[19] *Id*.

[20] *Miller-Davis v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014).

preting the language of the contract according to its plain and ordinary meaning.[21] If the language of a contract is unambiguous, we must enforce the contract as written.[22]

III. ANALYSIS

A. WHETHER THE FULL CREDIT BID RULE BARS CONTRACT CLAIMS AGAINST NONBORROWER THIRD PARTIES

We turn first to Bank of America's contention that the Court of Appeals erred by holding that the full credit bid rule barred its claims against Westminster and First American. As discussed previously, in reaching this conclusion, the Court of Appeals relied on *New Freedom*, which held that the full credit bid rule bars fraud and contract claims brought by the mortgagee against nonborrower third parties.[23] Bank of America argues that *New Freedom* was incorrectly decided and should be overruled.

As noted earlier, Bank of America foreclosed by advertisement on all four properties at issue in accordance with Michigan's foreclosure statutes.[24] Under our foreclosure by advertisement scheme, a mortgagee may foreclose by advertisement "[e]very mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage."[25] The statutes prescribe, among other things, the circumstances that must exist before foreclosure by advertisement can occur,[26] the procedure that the mortgagee

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[21] *Id*.

[22] See *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

[23] Because *New Freedom* was published, the Court of Appeals panel in the instant case was bound by it. See MCR 7.215(C)(2).

[24] MCL 600.3201 *et seq*.

[25] MCL 600.3201.

[26] MCL 600.3204.

must follow,[27] and the mortgagor's right of redemption.[28]

As part of this statutory scheme, the Michigan Legislature enacted MCL 600.3280, Michigan's anti-deficiency statute.[29] If a mortgagee sues a debtor to recover a deficiency judgment, the anti-deficiency statute allows the debtor to defend the suit by showing "that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value."[30] Such a showing will "defeat the deficiency judgment against [the debtor], either in whole or in

[27] See, e.g., MCL 600.3212 and MCL 600.3216.

[28] See, e.g., MCL 600.3240.

[29] MCL 600.3280 reads in pertinent part:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.

[30] MCL 600.3280. Anti-deficiency statutes like MCL 600.3280 were enacted in response to the Great Depression as an attempt "to address the ever-growing number of foreclosures and the effect they had on the grim residential real estate situation." Wright, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 Ala L Rev 231,

part . . . ."[31]

A mortgagee that elects to foreclose by advertisement may bid on the property at the sale,[32] and a mortgagee who does so "stands in the position of an ordinary purchaser . . . ."[33] However, unlike a third-party purchaser, a mortgagee is not required to make a cash bid. Instead, a mortgagee can make a bid on credit because any cash it tenders would be returned to it, and thus "[a]ctual payment to the sheriff would [be] an idle gesture."[34]

A mortgagee who bids on the property at a foreclosure sale is not required to bid the full amount of the debt.[35] If a mortgagee bids a lower amount, it may then pursue a deficiency judgment against the debtor, subject to the limitations set forth in the anti-deficiency statute.[36] However, a mortgagee can make a full credit bid—i.e., a credit bid "in an amount equal to the unpaid principal and interest of the mortgage debt, together with costs, fees, and other expenses of the foreclosure."[37] If a mortgagee's "full credit bid is suc-

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240-241 (2005). Michigan's original anti-deficiency statute was enacted by 1937 PA 143 and made retroactive to February 11, 1933.

[31] MCL 600.3280.

[32] *Pulleyblank v Cape*, 179 Mich App 690, 693; 446 NW2d 345 (1989).

[33] *Senters v Ottawa Sav Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993).

[34] *Griffin v Union Guardian Trust Co*, 261 Mich 67, 69; 245 NW 572 (1932); see also *Feldman v Equitable Trust Co*, 278 Mich 619; 270 NW 809 (1937).

[35] *Bankers Trust Co of Detroit v Rose*, 322 Mich 256, 261; 33 NW2d 783 (1948) (stating that the anti-deficiency statute "nowhere required [the mortgagee] to bid the full amount of the debt as a condition of bidding at the foreclosure proceedings").

[36] See MCL 600.3280.

[37] *Alliance Mtg Co v Rothwell*, 10 Cal 4th 1226, 1238; 44 Cal Rptr 2d 352; 900 P2d 601 (1995). See also 55 Am Jur 2d, Mortgages, § 524, pp 243-244.

cessful, i.e., results in the acquisition of the property, the lender pays the full outstanding balance of the debt and costs of the foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note."[38]

Under the full credit bid rule, a lender who takes title following a full credit bid "is precluded for purposes of collecting its debt from later claiming that the property is actually worth less than the bid."[39] This is because the mortgagee who enters such a bid is deemed "to have irrevocably warranted that the value of the security foreclosed upon was equal to the outstanding indebtedness and not impaired."[40] Thus, the full credit bid rule "makes a properly conducted nonjudicial foreclosure sale the dispositive device through which to resolve the question of value."[41] And, in its most direct application, the rule bars a mortgagee who takes title at a nonjudicial foreclosure sale following a full credit bid from pursuing a deficiency judgment against the mortgagor.[42]

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[38] *Id*. See also 55 Am Jur 2d, Mortgages, § 524, pp 243-244.

[39] *Alliance Mtg Co*, 10 Cal 4th at 1238. See also *Titan Loan Investment Fund, LP v Marion Hotel Partners, LLC*, 891 NE2d 74, 77 (Ind App, 2008) ("[The mortgagee] cannot bid and pay its entire judgment, interest, and costs at a sheriff's sale and then repudiate its bid in subsequent proceedings any more than a disinterested third party could have bid the same amount in cash and subsequently asked for a refund.").

[40] 55 Am Jur 2d, Mortgages, § 524, p 244.

[41] *Kolodge v Boyd*, 88 Cal App 4th 349, 356-357; 105 Cal Rptr 2d 749 (2001) (quotation marks and citation omitted).

[42] See *Pulleyblank*, 179 Mich App at 695 (concluding that the mortgagee's full credit bid "constituted full satisfaction of all indebtedness" and that "[i]t would defy logic to allow [the mortgagee] to bid an inflated price on a piece of property to ensure that they would not be overbid and . . . to then claim that the 'true value' was less than half of the value of the bid").

However, courts have recognized the applicability of the full credit bid rule in other contexts. For example, in *Smith v Gen Mtg Corp*, although not referring to the rule by its name, we considered the full credit bid rule in the context of the mortgagee's right to recover insurance proceeds for a loss occurring before the foreclosure sale.[43] There, the mortgagee submitted a bid on the property at a foreclosure sale for the full amount of the debt plus foreclosure costs. A fire had previously destroyed the house. Six months after the foreclosure, the mortgagee received the insurance proceeds. The mortgagors (i.e., the defaulting homeowners) sued to recover the insurance proceeds from the mortgagee. The mortgagors argued that they were entitled to the insurance proceeds because the mortgage debt was extinguished when the mortgagee bid in the amount of the debt at the foreclosure sale. The mortgagee argued that, because the property was nearly worthless, it was entitled to the proceeds.

The *Smith* Court recognized that the loss occurred before the mortgage sale and that "[a]lthough the mortgagee was entitled to the insurance proceeds to reduce the debt or repair the property, it instead purchased the property at the foreclosure sale."[44] It stated, "[W]hen the loss occurs before a foreclosure sale in which the mortgagee purchases the property for a bid which extinguishes the mortgage debt, the mort-

[43] *Smith v Gen Mtg Corp*, 402 Mich 125; 261 NW2d 710 (1978). The full credit bid rule has also been invoked in actions to recover for the waste of the mortgagor—see, e.g., *Cornelison v Kornbluth*, 15 Cal 3d 590; 125 Cal Rptr 557; 542 P2d 981 (1975); see also *Janower v FM Sibley Lumber Co*, 245 Mich 571, 573-574; 222 NW 736 (1929)—and actions claiming fraud by the mortgagor or other parties in inducing the mortgagee to make the loan; see *Alliance Mtg Co*, 10 Cal 4th 1226; but see *Chrysler Capital Realty, Inc v Grella*, 942 F2d 160 (CA 2, 1991).

[44] *Smith*, 402 Mich at 128.

gagee is not entitled to the insurance proceeds."[45] It then concluded:

> "No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors. Indeed, it is not conceivable that the mortgagee could recover a deficiency judgment against the mortgagor if it had bid in the full amount of the debt at foreclosure sale. To allow the mortgagee, after effectively cutting off or discouraging lower bidders, to take the property and then establish that it was worth less than the bid encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders."[46]

In this case, we must determine whether the full credit bid rule applies to bar contract claims against nonborrower third parties. This brings us to *New Freedom*, which was the first case in Michigan to address the full credit bid rule in this context.

In *New Freedom*, the plaintiff funded two mortgage loans.[47] Similar to the instant case, CPLs were issued in conjunction with the loans. Eventually, the borrowers defaulted on the loans, and a subsequent assignor foreclosed on the properties, making full credit bids. The assignor was indemnified by the plaintiff through an indemnity agreement. The plaintiff filed suit against several of the entities involved in the loans and the closings, arguing, among other things, that the

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[45] *Id*.

[46] *Id*. at 128-129, quoting *Whitestone Savings & Loan Ass'n v Allstate Ins Co*, 28 NY2d 332, 336-337; 321 NYS2d 862; 270 NE2d 694 (1971) (emphasis omitted). Although it adopted the rule for future cases, the Court declined to apply the full credit bid rule to the case before it, concluding that "[e]nforcement of this previously unannounced rule would confer an unearned benefit on plaintiffs." *Id*. at 130.

[47] *New Freedom*, 281 Mich App at 65-67.

title insurer was liable under the parties' CPLs for the fraudulent or dishonest acts or omissions of the closing agents. The trial court agreed that the title insurer, through the closing agents, had violated the CPLs, but found no liability because the plaintiff suffered no damages as a result of the assignor's full credit bid, which satisfied the debt.[48]

On appeal, much of the Court of Appeals' focus was on determining whether the full credit bid rule applied to bar fraud claims. In considering this issue, the Court reviewed a litany of cases from within and without this state discussing the full credit bid rule.[49] The panel concluded that the cases stood for multiple propositions, including that the full credit bid rule applied to actions brought by the mortgagee for fraud.[50] And, after reviewing two California cases, the panel held that the full credit bid rule precluded fraud actions against nonborrower third parties.[51] Later, the panel extended this conclusion by applying the full credit bid rule to bar the plaintiff's contract claims against nonborrower third parties as well.[52] In sum, the panel concluded that, in light of the full credit bids at the foreclosure sale, the plaintiff's claims against the nonborrower third parties (i.e., the appraiser, the closing

[48] *Id*.

[49] *Id*. at 70-74.

[50] *Id*. at 74. Whether the full credit bid rule bars fraud claims against the mortgagor or nonborrower third parties is not before us today. While Bank of America originally brought a fraud claim against Westminster for negligent misrepresentation, the claim has been dismissed. Only Bank of America's contract claims under the closing instructions and the CPLs remain.

[51] *Id*. at 73-74, citing *Alliance Mtg Co*, 10 Cal 4th 1226, and *Pacific Inland Bank v Ainsworth*, 41 Cal App 4th 277; 48 Cal Rptr 2d 489 (1995).

[52] *New Freedom*, 281 Mich App at 76-77.

agents, and the title insurer that issued the CPLs) were barred by the full credit bid rule.[53]

In determining that the full credit bid rule bars claims against nonborrower third parties, the *New Freedom* panel distinguished *Alliance Mortgage v Rothwell*[54] and relied on *Pacific Inland Bank v Ainsworth*.[55] We will discuss each of those cases in turn to determine whether they support this conclusion.

In *Alliance Mortgage*, the California Supreme Court considered the effect of a mortgagee's full credit bid on a claim of fraud in the inducement of the underlying loan obligation against the nonborrower, third-party defendants.[56] After a lengthy review of California's antideficiency statute, the full credit bid rule, and the applicable caselaw, the court concluded that the mortgagee's full credit bids did not, as a matter of law, bar its fraud claims against the defendants as long as the mortgagee could establish that "its full credit bids were a proximate result of defendants' fraud, and that in the absence of such fraud it would not, in all reasonable probability, have made the bids."[57] In so doing, it recognized that "[t]he full credit bid rule was not intended to immunize wrongdoers from the consequences of their fraudulent acts."[58]

Although *Alliance Mortgage* militates against *New Freedom*'s conclusion that the full credit bid rule bars

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[53] *Id*. at 74-75.

[54] *Alliance Mtg Co*, 10 Cal 4th 1226.

[55] *Pacific Inland Bank*, 41 Cal App 4th 277.

[56] *Alliance Mtg Co*, 10 Cal 4th at 1231.

[57] *Id*. at 1246-47.

[58] *Id*. Two concurring justices would have held that the full credit bid rule does not apply in the context of fraud claims against nonborrower third parties because such claims are not an attempt to collect on the debt, which is the predicate for the application of the rule. See *id*. at 1251-1254.

claims against nonborrower third parties, the *New Freedom* panel found *Alliance Mortgage* distinguishable, stating as follows: "[G]iven the lender's alleged fiduciary relationship with the defendants and the fact that it did not discover the alleged fraud until after the foreclosure sale, [*Alliance Mortgage*] held that the full credit bid rule did not, as a matter of law, bar its claims."[59] The panel concluded that *Alliance Mortgage* did not control the case before it because there were no allegations of a fiduciary relationship between the plaintiff and the nonborrower third parties in *New Freedom*.[60] However, the *Alliance Mortgage* Court specifically stated that the existence of a fiduciary relationship, or lack thereof, had no effect on its conclusion that the full credit bid rule does not, as a matter of law, bar fraud claims against nonborrower third parties.[61] Thus, we find *New Freedom*'s attempt to distinguish *Alliance Mortgage* unpersuasive.

In *Pacific Inland Bank*, the California Court of Appeals concluded that the full credit bid rule barred a negligence action against an appraiser and his company—i.e., nonborrower third parties.[62] The panel concluded that *Alliance Mortgage* only created an exception to the full credit bid rule for fraud claims against nonborrower third parties and thus concluded that, "absent a fraud claim, a full credit bid estops a plaintiff from establishing damages."[63]

However, more than one court has called into question the holding of *Pacific Inland Bank*. For example, in *In re King Street Investments*, the Court concluded

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[59] *New Freedom*, 281 Mich App at 73.

[60] *Id*.

[61] *Alliance Mortgage Co*, 10 Cal 4th at 1246 n 8.

[62] *Pacific Inland Bank*, 41 Cal App 4th at 279.

[63] *Id*. at 283.

that *Pacific Inland Bank*'s holding was not only inconsistent with *Alliance Mortgage* but also contrary to the purpose of the full credit bid rule and California's anti-deficiency statute because "[n]either the rule nor the statutes are concerned about the relationship between a third-party nonborrower and a lender."[64]

Similarly, in *Kolodge v Boyd*, the California Court of Appeals declined to follow *Pacific Inland Bank* in determining whether the full credit bid rule barred claims of fraud and negligence against an appraiser (i.e., a nonborrower third party).[65] In holding that the rule does not bar such claims, the court noted that, although *Alliance Mortgage* only considered the full credit bid rule in relation to fraud claims, "the rationale of *Alliance*, as well as the authorities the court relied upon, strongly suggest such bids also do not as a matter of law bar any other tort claims against third parties who are not borrowers . . . ."[66] The panel recognized that the full credit bid rule was designed "to ensure the integrity of nonjudicial foreclosure sales insofar as such sales may relate to the debtor protection policies of the antideficiency statutes."[67] Further, "[l]ike the antideficiency statutes, the full credit bid rule is not concerned about the relationship between the lender and third parties but only the relationship between the lender and the borrower . . . ."[68] After reviewing *Cornelison v Kornbluth*, which established the full credit bid rule in California, the court ob-

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[64] *In re King Street Investments*, 219 BR 848, 855 (Bankr CA 9, 1998).

[65] *Kolodge*, 88 Cal App 4th at 370. California Courts of Appeals are not bound by Court of Appeals' decisions from other districts or divisions. See *Jessen v Mentor Corp*, 158 Cal App 4th 1480, 1489 n 10; 71 Cal Rptr 3d 714 (2008).

[66] *Kolodge*, 88 Cal App 4th at 364.

[67] *Id*. at 356.

[68] *Id*. at 365-366.

served that it provided "no reason to think a full credit bid establishes the value of the property for any purpose other than a determination whether the borrower subject to the lien has satisfied the secured obligation."[69] Then, after analyzing *Pacific Inland Bank*, the court concluded that the case was "wrongly decided and decline[d] to follow it," noting that the "[a]pplication of the rule to bar claims against tort-feasors not party to the note goes far beyond the purpose of the rule and is simply irrational."[70]

Unlike the Court in *New Freedom*, we decline to rely on *Pacific Inland Bank* to extend the full credit bid rule to bar claims against nonborrower third parties. Instead, we are persuaded by *Alliance Mortgage* and *Kolodge*. As those courts recognized, the full credit bid rule is related to the anti-deficiency statute, and its purpose is merely to resolve the question of the value of the property for purposes of determining whether the mortgage debt was satisfied. It is not concerned with the relationship between the lender and third parties and was simply not intended to cut off all remedies a mortgagee might have against nonborrower third parties.[71]

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[69] *Id*. at 368, citing *Cornelison*, 15 Cal 3d 590.

[70] *Id*. at 370.

[71] One could argue (although no party does) that the full credit bid rule/insurance proceeds cases require a different result. These cases, which often involve a claim by a mortgagee against the insurer (i.e., a nonborrower third party), hold that such claims are barred by the full credit bid rule. See, e.g., *Heritage Fed Savings Bank v Cincinnati Ins Co*, 180 Mich App 720; 448 NW2d 39 (1989). However, we do not find these cases controlling in this context because, in an action to recover insurance proceeds, the crux of the dispute is whether the mortgagee or mortgagor is entitled to the proceeds (regardless of whether the mortgagor is made a party to the action). By contrast, in the instant case, the rights of the mortgagor are not at issue.

This is confirmed when the full credit bid rule is considered within our jurisprudence, as well as in relation to the claims at issue in this case. In Michigan, although the right to foreclose by advertisement is statutory,[72] "[s]tatutory foreclosures are a matter of contract, authorized by the mortgagor[.]"[73] As a result, the proceedings are limited to resolving the rights and remedies of the parties to the contract—i.e., the mortgagee and the mortgagor.[74] Moreover, the Legislature's intent in enacting the foreclosure by advertisement statutes was, in part, to protect the mortgagor by not allowing the mortgagee a double recovery.[75]

Likewise, when enacting Michigan's anti-deficiency statute, the Legislature clearly limited its effect to the rights of the parties to the mortgage debt. We have recognized that the Legislature enacted the anti-deficiency statute in an attempt "to safeguard *the rights of the debtor* and secure to the creditor that which is his due."[76] Indeed, only "the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon" may defend against a mortgagee's suit to recover a deficiency by showing "that the

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[72] *Calaveras Timber Co v Mich Trust Co*, 278 Mich 445, 450; 270 NW 743 (1936).

[73] *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953).

[74] See 54A Am Jur 2d, Mortgages, § 19, p 610 ("An instrument cannot operate as a mortgage unless there exist, as parties thereto, both a mortgagor and a mortgagee.").

[75] *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 341; 766 NW2d 30 (2008), vacated in part on other grounds 483 Mich 885 (2009).

[76] *Guardian Depositors Corp v Powers*, 296 Mich 553, 561; 296 NW 675 (1941) (emphasis added). See also *Bankers Trust Co of Detroit v Rose*, 322 Mich 256, 260; 33 NW2d 783 (1948) (stating that the purpose of the anti-deficiency statute is "to prevent a mortgagee from obtaining judgment for a deficiency where the mortgagee had obtained by way of foreclosure the actual title to premises which were of greater value than the amount of the debt secured by the mortgage").

property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value[.]"[77]

Further, holding that Bank of America's full credit bids meant that it suffered no damages whatsoever and thus could not recover under any theory would impinge on the parties' ability to contract as they see fit and would nullify the protections for which Bank of America contracted.[78] Through the contracts at issue, Bank of America sought to protect itself from the very activity that allegedly occurred in this case—fraud by those individuals involved in closing the mortgage. Bank of America's ability to recover under the contracts is not limited by its bids on the properties; instead, as discussed later in this opinion, the parties agreed that Bank of America could recover for *any loss* resulting from Westminster's failure to follow the closing instructions and its *actual losses* arising out of the fraud or dishonesty of Westminster in connection with the closings. Bank of America has presented evidence that it suffered actual losses when it sold the properties for much less than the amounts of the loans provided. We see no justification for limiting or nullifying Bank of America's contractual rights by application of a rule designed to determine Bank of America's rights in relation to the mortgagors.

In sum, although the full credit bid rule is not a creature of statute, we are cognizant of its relationship

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[77] MCL 600.3280.

[78] See *Bloomfield Estates Improvement Ass'n v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (recognizing that the freedom of contract is deeply entrenched in the common law and the right to make and enforce contracts is among the fundamental rights which are the essence of civil freedom).

to the foreclosure by advertisement and anti-deficiency statutes. Those statutes are carefully designed to govern the relationship between, and establish the rights and liabilities of, the mortgagee and mortgagor—not nonborrower third parties.[79] Like the courts in *Alliance Mortgage* and *Kolodge*, we conclude that there is no justification for extending the protections of the rule to alter the contractual rights and liabilities between a mortgagee and nonborrower third parties. Therefore, we hold that the full credit bid rule does not bar contract claims by a mortgagee against nonborrower third parties, and we overrule *New Freedom* to the extent that it conflicts with our decision today.

In the instant case, the Court of Appeals majority erred by concluding that the full credit bid rule barred Bank of America's claims against Westminster and First American stemming from the Kirkway and Enid closings. Instead, we agree with the Court of Appeals dissent that, while it is undisputed that Bank of America made full credit bids on those properties, the full credit bid rule does not bar Bank of America's contract claims against nonborrower third parties such as Westminster and First American.

B. LIABILITY UNDER THE CLOSING INSTRUCTIONS

Having determined that the full credit bid rule does not automatically preclude recovery for Bank of America, we now turn to the viability of Bank of

[79] For these reasons, we agree with the dissenting judge's conclusion that "the full credit bid rule and anti-deficiency statutes are not concerned about the relationship between a lender and a third-party nonborrower; rather, they are designed to protect debtors or borrowers by restricting the remedies available to secured creditors for defaulted debts secured by mortgages or deeds of trust." *Bank of America*, unpub op at 4 (MURPHY, C.J., concurring in part and dissenting in part), citing *In re King Street Investments*, 219 BR 848.

America's contract claims. We first consider Bank of America's breach of contract claim against Westminster for not complying with the specific provisions of the closing instructions at the Enid and Heron Ridge closings.

The closing instructions for the two closings performed by Westminster contain similar language. Among other things, the instructions required Westminster to contact Bank of America immediately if it could not comply with the instructions. Importantly, the instructions read, "As a closing agent you are financially liable for any loss resulting from your failure to follow these Instructions." The instructions could not be verbally altered; any alterations or amendments had to be in writing and faxed as necessary with a confirmation receipt. Any changes approved by Bank of America had to be initialed by all signatories. In addition, Bank of America had to approve the HUD-1 settlement statement before closing.

To prevail on its claim for breach of contract against Westminster for violation of these contracts, Bank of America must establish by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach.[80] The parties quarrel over the first element—whether the closing instructions constitute contracts upon which a claim may be brought.[81]

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[80] *Miller-Davis*, 495 Mich at 178.

[81] This is a matter of first impression in Michigan. However, we note that many courts have recognized that closing instructions may constitute contracts. See, e.g., *Plaza Home Mtg Inc v North American Title Co, Inc*, 184 Cal App 4th 130, 139; 109 Cal Rptr 3d 9 (2010) (indicating that the lender and the closing agent "had a direct contractual relationship arising from the closing instructions"); *FDIC v US Titles, Inc*, 939 F Supp 2d 30, 38-40 (D DC, 2013) (recognizing that violation of closing

"A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation."[82] The parties do not dispute that they were competent to contract or that loan closings are a proper subject matter for a contract. In addition, there is no question regarding the existence of legal consideration. In order for consideration to exist, there must be a bargained-for exchange—"a benefit on one side, or a detriment suffered, or service done on the other."[83] Here, Westminster received a fee in exchange for handling the Enid and Heron Ridge closings, thus satisfying the consideration requirement. Further, there was mutuality of agreement and mutuality of obligation. Bank of America submitted the closing instructions to Westminster, and Westminster agreed to the closing instructions by performing the closings for Bank of America. Further, Westminster acknowledged that it understood its obligations under the closing instructions and indeed agreed to perform those obligations—the closing agent signed in acknowledgement that "I have closed this loan in accordance with the foregoing Instructions. I CERTIFY COMPLIANCE WITH ALL OF THE CONDITIONS OUTLINED IN THESE INSTRUCTIONS."

As a result, the closing instructions in the instant case satisfied all the elements of a valid contract. Therefore, we hold that closing instructions can constitute a contract and that the closing instructions

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instructions can lead to a viable breach of contract claim); *FDIC v Floridian Title Grp*, 972 F Supp 2d 1289, 1295 (SD Fla, 2013) (concluding that the FDIC presented evidence that the closing instructions constituted a contract).

[82] *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015).

[83] *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002) (quotation marks and citation omitted).

between Bank of America and Westminster do, in fact, constitute contracts upon which a breach of contract action may lie.

Nonetheless, the Court of Appeals concluded that, to the extent the closing instructions constituted contracts, Westminster's duties under the contracts were specifically modified and limited by the CPLs between Bank of America and First American. We disagree.

Parties to a contract are at liberty to modify or waive the rights and duties established by a contract.[84] Further, "a modification or waiver can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract."[85] But a party cannot "*unilaterally* alter an existing bilateral agreement."[86] Instead, a party alleging a modification of a contract "must establish a mutual intention of the parties to waive or modify the original contract."[87] "This principle follows from the contract formation requirement that is elementary to the exercise of one's freedom to contract: mutual assent."[88]

Under these well-recognized principles, the CPLs in the instant case could not have modified the closing instructions between Bank of America and Westminster. Nothing in the contract purports to limit and modify Westminster's duties as the closing agent. Instead, the contract merely provides the limitations on First American's agreement to indemnify Bank of America for any errors arising from the closing on

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[84] See *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003).

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*.

behalf of the closing agent (Westminster). Most importantly, even if the CPLs did purport to modify Westminster's duties under the closing instructions, the CPLs are contracts between First American and Bank of America *only*. As Westminster is not a party to the CPLs, it cannot be that the CPLs modified *Westminster's* obligations under the closing instructions because Bank of America and Westminster did not mutually agree to modify the obligations under the closing instructions. Because mutuality is a necessary predicate to the modification of a contract,[89] the Court of Appeals erred to the extent it concluded that the contracts between Bank of America and Westminster were modified by the CPLs between Bank of America and First American.

Having clarified the contractual relationship between Bank of America and Westminster, we decline to decide whether summary disposition is appropriate on this claim at this time. Instead, we vacate the entirety of the Court of Appeals' analysis of the issue, because of its erroneous belief that the closing instructions were modified by the CPLs. Moreover, the trial court's only mention of this claim in its opinion and order was that, under *New Freedom*, there was no breach of contract by defendant Westminster. However, *New Freedom* did not involve a breach of contract claim based on the closing instructions and thus does not control the instant issue. Therefore, we remand to the trial court for it to reconsider, under the parameters set forth in this opinion, whether summary disposition under MCR 2.116(C)(10) is appropriate as to Bank of America's claim for breach of contract against Westminster.

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[89] See *id*.

C. LIABILITY UNDER THE CLOSING PROTECTION LETTERS

We turn next to Bank of America's claim against First American for liability under the CPLs.

A CPL "is a contract between the title company and the lender whereby the title insurance company agrees to indemnify the lender for any losses caused by the failure of the title agent to follow the lender's closing instructions."[90] A CPL "is necessary because, while a title agent is the agent of the title insurance company for purposes of selling the title insurance policy (and binding the company to the insurance contract), that agency relationship does not extend to the title agent's conduct at the closing."[91] As a result, "[a] lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services must separately contract with the title insurer for such additional protection by entering into an 'insured closing letter' or 'closing protection letter.' "[92]

Under the CPLs in the instant case, First American agreed to reimburse Bank of America for

> actual loss incurred by [Bank of America] in connection with such closings when conducted by the Issuing Agent (an Agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of:
>
> 1. Failure of the Issuing Agent to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said

[90] *In re Lowenstein*, 459 BR 227, 236 (ED Penn, 2011).

[91] *Id*.

[92] *Id*. (quotation marks and citation omitted).

> mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.[93]

Bank of America only asserts that First American is liable under § 2 for the fraud and dishonesty of Westminster and Patriot in connection with the four closings.[94]

On this issue, the trial court concluded that First American was not liable under § 2 of the CPLs because Bank of America "failed to present any evidence of concealed disbursements, shortages or unpaid prior lien holders." Further, the trial court stated, "The Court of Appeals in *New Freedom* specifically found that any misrepresentation on the HUD-1 settlement is not fraud in the handling of the lender's document." Because it appears that the trial court misinterpreted the parties' contracts, we clarify the circumstances under which First American may be liable under the CPLs.

As mentioned previously, we enforce a contract as written.[95] Section 2 can be broken down into two parts:

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[93] Westminster and Patriot are the Issuing Agents mentioned in the language of the CPLs.

[94] In its order granting summary disposition, the trial court held that First American was not liable under Subsection (1) of the CPLs. We need not consider this issue because, as Bank of America readily admits, it never argued before the trial court that First American was liable under Subsection (1), nor does it attempt to do so now.

[95] *In re Smith Trust*, 480 Mich at 24.

(1) fraud or dishonesty (2) of the Issuing Agent handling your funds or documents in connection with such closings. Considering the latter clause first, it is clear that Westminster and Patriot are the Issuing Agents "handling your funds or documents in connection with such closings." Therefore, in order for First American to be liable under the CPLs, Bank of America must establish that it suffered actual losses arising out of the fraud or dishonesty of Westminster and Patriot in connection with the closings.

The Court of Appeals in this case recognized that the terms "fraud or dishonesty" were quite broad. The Court stated:

> The common meaning of "dishonesty" is the opposite of "honesty;" it is "a disposition to lie, cheat, or steal" or a "dishonest act; fraud." *Random House Webster's College Dictionary* (1992), p 385. Our Supreme Court in *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176, 179, 188; 362 NW2d 595 (1984), discussed the "natural, common, ordinary, and primarily understood meaning" of the word "fraud," as used in MCL 257.248 requiring a surety bond of motor vehicle dealers providing indemnification of certain persons for loss "caused through fraud, cheating, or misrepresentation in the conduct of the vehicle business." The Court noted that the "natural, common, and ordinarily understood definition of the word 'fraud' embraces both actual and constructive fraud." *General Electric Credit Corp*, 420 Mich at 188. Thus, the plain meaning of "fraud" includes "both actual fraud—an intentional perversion of the truth—and constructive fraud—an act of deception or a misrepresentation without an evil intent." *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 101 n 2; 666 NW2d 623 (2003) (Young, J., *concurring*). Fraud may also be committed by suppressing facts—silent fraud—where circumstances establish a legal duty to make full disclosure. *Id*., citing *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543

> (2000). Such a duty of full disclosure may arise when a party has expressed to another "some particularized concern or made a direct inquiry." *M & D, Inc v McConkey*, 231 Mich App 22, 29; 585 NW2d 33 (1998).[96]

Neither party quarrels with the Court of Appeals' construction of these words. And because we believe it to be a proper interpretation of the words "fraud or dishonesty" as contained in the CPLs, we adopt the analysis in full.

Notwithstanding the unambiguous language of the parties' CPLs, the trial court and the Court of Appeals majority imposed additional requirements on Bank of America not found in the plain language of the parties' contracts, including (1) that Bank of America must present evidence of concealed disbursements, shortages, or unpaid prior lien holders and (2) that First American, as a matter of law, could not be liable based on the fraud or dishonesty of Westminster and Patriot in the handling of a HUD-1 settlement statement.

First, it is unclear why the trial court concluded that Bank of America must present evidence of concealed disbursements, shortages, or unpaid prior lien holders in order to recover for the fraud or dishonesty by Westminster or Patriot. Given that no such restrictions are found in § 2 of the parties' CPLs, the trial court erred by reading them into the parties' contract. Again, as discussed earlier, Bank of America must only establish that it suffered actual losses arising out of the fraud or dishonesty of Westminster or Patriot in connection with the closings.

Second, the lower courts' conclusions regarding the HUD-1 settlement statements appear to stem from their reliance on *New Freedom*, which also considered

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[96] *Bank of America*, unpub op at 8-9.

a title insurer's liability under a CPL. In *New Freedom*, the CPLs stated that the title insurer was liable for actual losses arising out of the "[f]raud or dishonesty of the Issuing Agent *in* handling your funds or documents in connection with such closings."[97] The panel interpreted this phrase to mean that the title insurer was only liable for the fraud or dishonesty of the closing agent *in handling the lender's funds or documents in connection with the closings*. The panel recognized that "[a]lthough there were discrepancies in the HUD-1 settlement statement and the attachment to the HUD-1 settlement statement was falsely attested, these documents did not belong to plaintiff" and thus there was "no evidence that it committed any fraud or dishonesty in handling documents that belonged to plaintiff."[98]

We conclude that the trial court and Court of Appeals majority erred by relying on *New Freedom* to interpret the CPLs in the instant case. The title insurer in *New Freedom* was liable for the actual losses arising out of the "[f]raud or dishonesty of the Issuing Agent *in* handling your funds or documents in connection with such closings,"[99] whereas in the instant case, First American is liable for actual losses arising out of "[f]raud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings." Although the distinction is slight—the only difference is the word "in"—the distinction is legally significant. As the Court of Appeals dissent properly recognized, "If the word 'in' is included, it defines, and effectively restricts, the types or categories of fraudulent or dishonest activities by a

[97] *New Freedom*, 281 Mich App at 81 (emphasis added) (quotation marks omitted).

[98] *Id*. at 83.

[99] *Id*. at 81 (emphasis added) (quotation marks omitted).

closing agent that can give rise to a right to indemnification, limiting them to conduct associated with handling the mortgage company's funds or documents."[100] On the other hand, "[i]f the word 'in' is not included, as is the case here, the phrase 'handling your funds or documents in connection with . . . closings' simply defines or identifies the closing agent, effectively broadening the indemnification coverage to any acts of fraud or dishonesty by the closing agent related to a closing."[101] In light of this distinction, the fraud or dishonesty by Westminster or Patriot need not be tied to their handling of Bank of America's funds or documents. As a result, Bank of America is able to offer evidence that Westminster and Patriot engaged in fraud or dishonesty in the handling of the HUD-1 settlement statements at closing, regardless of whether those documents belong to Bank of America.

Therefore, we conclude that the trial court and the Court of Appeals erred to the extent they relied on *New Freedom* to resolve this issue. Having clarified the parameters of Bank of America's claim against First American, we remand to the trial court for it to reconsider whether summary disposition in favor of First American regarding its liability under the CPLs was appropriate. On remand, the inquiry is whether genuine issues of material fact remain regarding Bank of America's actual losses arising from the fraud or dishonesty of Westminster and Patriot in connection with the closings.

IV. CONCLUSION

The Court of Appeals in *New Freedom* erred by

[100] *Bank of America*, unpub op at 2 (MURPHY, C.J., concurring in part and dissenting in part).

[101] *Id*.

extending the protections of the full credit bid rule to bar contract claims brought by the mortgagee against nonborrower third parties. Therefore, we overrule *New Freedom* to the extent it conflicts with this opinion. Further, the Court of Appeals in the instant case erred by concluding that the full credit bid rule barred recovery for Bank of America as to its claims regarding the Kirkway and Enid closings. The full credit bid rule does not bar contract claims against nonborrower third parties. For the reasons stated in this opinion, we reverse the Court of Appeals judgment and remand to the trial court for reconsideration of whether summary disposition under MCR 2.116(C)(10) was appropriate on Bank of America's contract claims against Westminster and First American. We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

PEOPLE v SEEWALD

Docket No. 150146. Argued November 5, 2015 (Calendar No. 5). Decided April 25, 2016.

Paul C. Seewald was charged in the 16th District Court with nine counts of falsely signing nominating petitions, which is a misdemeanor under MCL 168.544(a), and one count of conspiring to commit a legal act in an illegal manner, which is a felony under MCL 750.157a(d). Seewald and Don Yowchuang had worked in the district office of former Congressman Thaddeus McCotter during McCotter's 2012 reelection campaign. McCotter had to submit at least 1,000 valid voter signatures before the Secretary of State could certify his placement on the ballot. The day before the nominating petitions were due, Seewald and Yowchuang realized that several of the petitions had not been signed by their circulator, as required by MCL 168.544c(5). They agreed to sign the petitions as circulators, even though they had not circulated the petitions themselves, so that McCotter would qualify to appear on the ballot. The voter signatures on those petitions were subsequently disqualified under MCL 168.544c(10)(a), and the remaining signatures were too few to secure McCotter's place on the ballot. A criminal investigation of Seewald and Yowchuang then led to the charges in this case. Following the preliminary examination, the court, Sean P. Kavanagh, J., bound Seewald over to the Wayne Circuit Court as charged. Seewald moved to quash the information on the felony charge. The circuit court, Margie R. Braxton, J., granted his motion and dismissed the felony charge against him, concluding that there had been no conspiracy to commit a legal act. The Court of Appeals, SAAD and DONOFRIO, JJ. (JANSEN, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued August 5, 2014 (Docket Nos. 314705 and 314706), agreeing that the prosecution could not show an agreement to commit a legal act. The Supreme Court granted the prosecution's application for leave to appeal. 497 Mich 909 (2014).

In a unanimous opinion by Justice LARSEN, the Supreme Court *held*:

The district court properly found that the prosecution had presented sufficient evidence to establish probable cause that Seewald committed the felony of conspiracy to commit a legal act in an illegal manner. The gist of conspiracy lies in the illegal agreement, and once the agreement is formed, the crime is complete. Michigan law requires no proof of an overt act taken in furtherance of the conspiracy, and the prosecution need not prove that the purpose contemplated by the unlawful agreement was accomplished. MCL 750.157a, retaining the common-law formulation of conspiracy, provides that any person who conspires with one or more other persons to commit an offense prohibited by law or commit a legal act in an illegal manner is guilty of conspiracy. Under MCL 750.157a(a), the penalties for conspiring to commit an illegal act roughly track the penalties for the substantive offense. Under MCL 750.157a(d), however, conspiracies to commit a legal act in an illegal manner are categorically subject to penalties of up to five years' imprisonment or a $10,000 fine, or both, regardless of whether the illegal manner itself would constitute a felony or a misdemeanor if charged as a substantive offense. In this case, the sentencing scheme elevated conduct that could have been charged as a misdemeanor (either as falsely signing petitions or conspiring to do so) to conduct chargeable as a five-year felony. The prosecution argued that submitting nominating petitions with valid signatures is, in the abstract, a legal act and that Seewald and Yowchuang agreed to perform this legal act by falsely signing the petitions as circulators, which was the illegal means by which the conspirators agreed to perform the generally legal act of submitting nominating signatures. Seewald argued instead that there had never been an agreement to commit a legal act because while submitting nominating petitions with valid voter signatures is generally legal, the voter signatures on the petitions would become invalid by operation of law once he and Yowchuang falsely signed them, and their submission would therefore be illegal. Under this view, the only agreement between Seewald and Yowchuang was to do an illegal act through an illegal means. The term "legal act" in the conspiracy statute, however, is properly interpreted as referring to the lawfulness of the act in general rather than with respect to the specific facts of the case. Proof is required of an agreement to perform an act that is legal in generic terms as opposed to one that would be legal as performed in the particular circumstances of the case. The Court of Appeals erred by concluding that the illegality of the means (signing falsely) tainted the ends (submitting nominating petitions) and made those ends illegal too and that there accordingly was no legal act at all or any agreement to perform one.

Reversed and remanded to the circuit court for reinstatement of bindover order.

CRIMINAL LAW — CONSPIRACY — LEGAL ACTS PERFORMED IN AN ILLEGAL MANNER.

MCL 750.157a provides that any person who conspires with one or more other persons to commit an offense prohibited by law or commit a legal act in an illegal manner is guilty of conspiracy; with respect to committing a legal act in an illegal manner (punishable under MCL 750.157a(d) as a felony regardless of whether the illegal manner would constitute a felony or a misdemeanor if charged as a substantive offense), the term "legal act" refers to the lawfulness of the act in general rather than its lawfulness under specific facts; proof is required of an agreement to perform an act that is legal in generic terms as opposed to one that would be legal as performed in the particular circumstances of the case.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Bruce H. Edwards*, Assistant Attorney General, for the people.

Fausone Bohn, LLP (by *Keith W. Madden*), for defendant.

Amicus Curiae:

Victor A. Fitz, *Eric J. Smith*, and *Joshua Van Laan* for the Prosecuting Attorneys Association of Michigan.

LARSEN, J. This case requires us to decide what alleged conduct is sufficient to warrant a bindover on the peculiar charge of "conspiring to commit a legal act in an illegal manner," MCL 750.157a(d). In an anomalous reversal of roles, defendant, Paul Seewald, argues that his aim was illicit through and through. He never agreed to commit any *legal* act. Rather he conspired to commit an *illegal* act illegally; and that double illegality should set him free. The prosecution, for its part, argues that while defendant's agreed-to means were surely illegal, his conspiratorial ends were purely *legal*; and that legality is sufficient to try him as a felon.

The irony is not lost on us. Yet, after examining the conspiracy statute, we hold that the conduct alleged provides probable cause for trial on the charge. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for reinstatement of the 16th District Court's order to bind defendant over and for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Defendant and alleged coconspirator Don Yowchuang worked in the district office of former Congressman Thaddeus McCotter during McCotter's 2012 reelection campaign.[1] Michigan election law required McCotter to submit at least 1,000 valid voter signatures before the Secretary of State could certify his placement on the ballot.[2] Defendant and Yowchuang bore some responsibility for collecting those signatures and submitting them to the Secretary of State. The day before the nominating petitions were due, defendant and Yowchuang realized that several of the petitions had not been signed by their circulator, as required by law.[3] To solve this problem, they agreed to sign the petitions as circulators even though they had not circulated the petitions themselves. Defendant and

[1] We note at the outset that this case is only at the bindover stage. The facts presented in this opinion are gleaned mostly from testimony given by defendant and Yowchuang at pretrial interviews.

[2] MCL 168.544f.

[3] MCL 168.544c(5), as amended by 2014 PA 94 and 2014 PA 418, requires each individual petition to be signed and dated by the person who circulated the petition—the circulator—after the signatures for that petition have been collected. The Secretary of State is forbidden to count signatures submitted on an unsigned petition. *Id*. At the time this case arose, the version of the statute as amended by 2002 PA 431 was in effect, and the applicable subsection was Subsection (4). For ease of reference, however, this opinion will use and quote the 2014 version of MCL 168.544c.

Yowchuang explained that they signed as circulators so McCotter would qualify to appear on the ballot.

The Board of State Canvassers discovered the petitions' irregularities and, pursuant to MCL 168.544c(10)(a), disqualified the voter signatures contained thereon.[4] The remaining signatures were too few to secure McCotter's place on the ballot. Shortly after the announcement that his name would not appear on the ballot, McCotter resigned his seat in the House of Representatives.

These events led to a criminal investigation. Defendant was charged with nine counts of falsely signing petitions, a misdemeanor under MCL 168.544c(9), and one count of felony conspiracy to commit a legal act in an illegal manner under MCL 750.157a. The conspiracy count charged defendant with agreeing "together with [Yowchuang] to submit nominating petitions with valid signatures to The Michigan Secretary of State by falsely signing the petitions as the circulator[.]"[5]

Following a preliminary examination, the 16th District Court bound defendant over to the Wayne Circuit Court as charged; defendant then moved to quash the information on the felony charge. The circuit court granted defendant's motion and dismissed the felony charge against him, concluding that

[4] Pursuant to MCL 168.544c(10)(a), any "obviously fraudulent signatures on a petition form," which include the false signature of one purporting to be a circulator, are disqualified and may not be counted toward the number of signatures a candidate needs to appear on the ballot.

[5] Yowchuang was also charged with 10 counts of felony forgery, 6 counts of misdemeanor falsely signing petitions, and 1 count of felony conspiracy to commit a legal act in an illegal manner. Those charges are not directly at issue in this case.

there had been no conspiracy to commit a legal act.[6] The Court of Appeals affirmed, agreeing that the prosecution could not show an agreement to commit a legal act.[7] We granted the prosecution's application for leave to appeal.[8]

II. STANDARD OF REVIEW

In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony.[9] This standard requires "evidence of each element of the crime charged or evidence from which the elements may be inferred."[10] Absent an abuse of discretion, a reviewing court should not disturb the district court's bindover decision.[11] An abuse of discretion occurs when the trial court's decision "falls outside the range of principled outcomes."[12] Determining the scope of a criminal statute is a question of statutory interpretation, which we review de novo.[13]

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[6] *People v Seewald*, unpublished order of the Wayne Circuit Court, entered January 18, 2013 (Case No. 12-010198-02-FH).

[7] *People v Seewald*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2014 (Docket No. 314705).

[8] *People v Seewald*, 497 Mich 909 (2014).

[9] See MCL 766.13.

[10] *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989), citing *People v Doss*, 406 Mich 90; 276 NW2d 9 (1979).

[11] *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). See also *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000) (commenting that appellate courts "review the district court's original exercise of discretion" when reviewing a decision to bind a defendant over to the circuit court).

[12] *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 528; 872 NW2d 412 (2015), citing *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

[13] *Stone*, 463 Mich at 561, citing *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

III. CONSPIRACY

The "gist" of conspiracy "lies in the illegal agreement";[14] once the agreement is formed, the "crime is complete."[15] Michigan law requires no proof of an overt act taken in furtherance of the conspiracy. And, because the crime is complete upon the conspirators' agreement, the prosecution need not prove that "the purpose contemplated by the unlawful agreement was accomplished."[16]

At common law, conspiracy consisted of "an understanding or agreement to accomplish an unlawful end, or a lawful end by unlawful means."[17] Most states have since abandoned this common-law formulation, jettisoning the "lawful end by unlawful means" alternative in favor of a requirement that the object of the conspiracy be itself criminal.[18] Michigan's conspiracy statute, by contrast, has retained the common-law form. MCL 750.157a provides:

> Any person who conspires together with 1 or more

[14] *People v Asta*, 337 Mich 590, 611; 60 NW2d 472 (1953).

[15] *People v Justice*, 454 Mich 334, 345-346; 562 NW2d 652 (1997), quoting *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982).

[16] *Asta*, 337 Mich at 611.

[17] *People v Tenerowicz*, 266 Mich 276, 285; 253 NW 296 (1934). See also 2 LaFave, Substantive Criminal Law (2d ed), § 12.1(a), p 255 ("[I]n 1832 came Lord Denman's famous epigram that a conspiracy indictment must 'charge a conspiracy either to do an unlawful act or a lawful act by unlawful means' . . . .").

[18] 2 LaFave, § 12.3(a), p 287 ("[M]ost states provide that the object of a criminal conspiracy must be some crime or some felony.") (collecting statutes). See, e.g., La Stat Ann 14:26, Reporter's Comment—1950 ("By limiting 'criminal conspiracy' to cases where a substantive crime is involved we escape the hazardous undertaking of trying to determine when a lawful act is being done with a fraudulent or corrupt purpose,--a problem which plagued the common law."); Ala Code 13A-4-3, Commentary (noting the "vagueness and uncertainty of the common law definition of conspiracy").

> persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . [.]

As at common law, then, the statutory crime of conspiracy can be established in one of two ways: by proof that two or more persons have agreed to do an act that is in itself unlawful, or by proof that two or more persons have agreed to do a legal act using illegal means.

There can be little doubt that the Legislature intended to proscribe two forms of conspiracy. The plain language of the statute contemplates it,[19] and distinct penalty provisions govern the commission of conspiracies to commit legal and illegal acts.[20]

The statute provides penalties for conspiring to commit an *illegal* act that roughly track the penalties

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[19] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) ("If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.").

[20] We note also that two separate committees examining the criminal code advocated a change to the conspiracy statute due to the indeterminate nature of the current law. First, the 1967 Joint Committee of the State Bar of Michigan suggested that the conspiracy statute be limited to conspiracies to commit a criminal act because of the "open-ended" nature of the conspiracy to commit a legal act in an illegal manner. Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 Wayne L Rev 772, 819-820 (1968), citing Michigan Revised Criminal Code (final draft, 1967), § 1015, comment, p 98. Second, in 1979, another State Bar committee recommended a change to the statute, arguing that the current formulation is "too vague and indefinite." Michigan Second Revised Criminal Code (final draft, June 1979), § 1015, Committee Commentary, p 108. The committee further noted: "[R]eported cases indicate little practical need for such a broad definition of an illicit conspiratorial objective. With few exceptions, past reported cases all have involved conspiracies to commit acts that were in themselves criminal." *Id*. at 109. However, the Legislature has not amended the statute following its initial codification in 1966 by 1966 PA 296.

for the substantive offense. Conspiracies to commit a felony are subject to the same penalties as the corresponding substantive offense.[21] Conspiracies to commit a misdemeanor may be punished by no more than one year in prison, a $1,000 fine, or both.[22]

Conspiracies to commit a *legal* act in an illegal manner are treated differently. The statute makes such conspiracies categorically subject to penalties of up to five years' imprisonment, a $10,000 fine, or both, regardless of whether the "illegal manner" would constitute a felony or a misdemeanor if charged as a substantive offense.[23] On the facts of the present case, this sentencing scheme elevates conduct that could be charged as a misdemeanor—either as falsely signing petitions or as conspiracy to do the same—to conduct chargeable as a five-year felony. In a different case, the statute might allow a prosecutor to limit punishment by charging conduct punishable as a felony with a higher maximum penalty as a felony with a five-year maximum. The scheme thus places great discretion in the hands of prosecutors. Absent constitutional infirmity, however,[24] we must give effect to the statute the Legislature has crafted.

IV. THE BINDOVER

We now consider whether defendant's agreement with Yowchuang can provide the basis for a bindover on a charge of violating MCL 750.157a(d). The statute specifies three elements: (1) conspiring, (2) to commit a legal act, (3) in an illegal manner. Here, the prosecu-

[21] MCL 750.157a(a).

[22] MCL 750.157a(c).

[23] MCL 750.157a(d).

[24] We note that defendant has raised no constitutional objections to the statute.

tion charged that defendant conspired "together with [Yowchuang] to submit nominating petitions with valid signatures to The Michigan Secretary of State by falsely signing the petitions as the circulator[.]" The parties agree that falsely signing a nominating petition as a circulator is an illegal act.[25] What divides them is whether the agreement to falsely sign as circulators can be charged as an illegal means to commit a *legal* act.

The prosecution argues that submitting nominating petitions with valid signatures to the Secretary of State is, in the abstract, a legal act. Defendant and Yowchuang agreed to perform this legal act by falsely signing the petitions as circulators. In the prosecution's view, falsely signing is the illegal means by which the conspirators agreed to perform the generally legal act of submitting nominating signatures.

Defendant, by contrast, argues that, on the facts of this case, there never was any agreement to commit a legal act. Although submitting nominating petitions containing valid voter signatures to the Secretary of State is generally legal, once defendant and Yowchuang falsely signed the petitions, the voter signatures contained thereon would become *invalid* by operation of law, and their submission to the Secretary of State would therefore be *illegal*. Thus, as defendant characterizes the facts here, the only agreement between defendant and Yowchuang was to do an *illegal* act through illegal means.

At bottom, then, the dispute revolves around whether to read the conspiracy statute as requiring proof of an agreement to perform an act legal in generic terms or legal as it would be performed in the particu-

[25] See MCL 168.544c(8) and (9).

lar circumstances of the case. We conclude that it must be the former.

This Court has never opined on the scope of the "legal act" requirement under MCL 750.157a, and so we have no precedent on point.[26] Yet, defendant's suggestion that we should train our focus on the specific facts of the case when construing the statute's requirement of an agreed-upon "legal act" points us in the direction of our impossibility jurisprudence. Another way to have presented defendant's argument, after all, would have been to argue that it was *impossible*, on the facts of the case, to have done the legal act alleged (submitting nominating petitions) because the illegal means alleged (false signing) made the legal act illegal. Defendant has not squarely raised an impossibility defense. Still, our precedent discussing impossibility can guide us toward the proper reading of the statutory text.

In *People v Thousand*,[27] this Court discussed the availability of an impossibility defense with respect to a charge of attempt under MCL 750.92, which criminalizes attempts to commit an "offense prohibited by law." The offense at issue was distribution of obscene material to a minor, an act which is generally illegal.[28] The defendant, however, claimed entitlement to an

[26] The parties have identified only one case in this Court arising out of a conviction under MCL 750.157a(d): *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977). But that case did not analyze what it meant to commit a legal act in an illegal manner. The defendants there did not contest the validity of the charge, either in this Court or in the Court of Appeals. Accordingly, neither Court ruled on the question or even commented on it in dictum. To argue, by working backwards from *Duncan*'s facts, that the charge in that case must have been valid, when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture.

[27] *People v Thousand*, 465 Mich 149; 631 NW2d 694 (2001).

[28] See MCL 722.675 (currently denominating the offense as "disseminating sexually explicit matter to a minor").

impossibility defense because the intended recipient of the obscene material was not, in fact, a minor, but instead an adult undercover law enforcement officer.[29] In a scholarly opinion considering the state of the law with respect to impossibility as a defense to inchoate crimes generally, the Court concluded that impossibility was not a valid defense to the crime of attempt.[30] It did not matter, therefore, that completion of the substantive offense was impossible on the facts of the case, the recipient being an adult, not a child. What mattered was that the defendant attempted to commit an offense generally prohibited by law.[31] The Court thus reinstated the charge against the defendant.

As noted, defendant has not squarely raised the defense of impossibility, and the parties have not briefed the question of its availability. We do not, therefore, resolve that question here. What *Thousand* suggests, however, is that the term "legal act" in the conspiracy statute is most properly read in the same manner that we read the language "offense prohibited by law" in the related statute criminalizing attempt: as referring to the lawfulness of the act in general, rather than with respect to the specific facts of the case. If, in *Thousand*, the statutory term "offense prohibited by law" had been read not as referring to offenses *generally* prohibited, but had instead been read in light of the particular facts of the case, there would have been no need to have discussed the availability of a defense. As the partial dissent in that case hinted, the charges could not have been sustained.[32]

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[29] *Thousand*, 465 Mich at 155.

[30] *Id*. at 162-166.

[31] *Id*. at 165-166.

[32] *Id*. at 175 (KELLY, J., concurring in part and dissenting in part). In *People v Tinskey*, 394 Mich 108; 228 NW2d 782 (1975), this Court also

We are buoyed in this conclusion by the realization that to read the term "legal act" to mean "an act that is legal in light of the specific facts of the case," instead of "an act that is legal generally," would threaten to drain all meaning from the legal-act prong of the conspiracy statute. This we are loath to do. When possible, we strive to avoid constructions that would render any part of the Legislature's work nugatory.[33] Here, the text and structure of MCL 750.157a make clear that the Legislature intended to criminalize both conspiring to commit an offense prohibited by law *and* conspiring to commit a legal act in an illegal manner. The Court of Appeals' and defendant's analyses, however, would effectively collapse the two into one.

The Court of Appeals reasoned that the false signing (a concededly illegal act) made the later generally lawful act (submitting petitions) into an illegal act, since it involved "[defendant's and Yowchuang's] defrauding of the Secretary of State."[34] Thus, the Court reasoned, the illegality of the means (signing falsely) tainted the ends (submitting nominating petitions) and made those ends illegal too. Accordingly, the Court concluded there was no *legal* act at all, nor any agreement to commit one. But if any illegal means taints the legality of the ends, it is difficult to envision the scenario in which a person could commit a legal act in an illegal manner.[35] The

briefly discussed the doctrine of impossibility as a defense to a charge of attempt. The charge in *Tinskey*, however, was conspiracy, not attempt. Although the Court discharged the defendants, the order leaves some ambiguity as to the grounds for the discharge.

[33] *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

[34] *Seewald*, unpub op at 4.

[35] When asked at oral argument to describe a scenario in which a person might properly be charged with committing a legal act in an illegal

Court of Appeals thus erred by giving the statute a construction that threatened to combine two distinct forms of conspiracy into one.

Defendant argues that just the opposite is true—that the prosecution's reasoning would eliminate the statutory distinction between conspiracies to commit an offense prohibited by law and conspiracies to commit a legal act in an illegal manner. We are not persuaded. It may be that the single agreement between defendant and Yowchuang satisfied the elements of both flavors of conspiracy: conspiracy to commit an offense prohibited by law, which in this case was a misdemeanor, and felony conspiracy to commit a legal act in an illegal manner. But this does not, as defendant contends, eliminate the misdemeanor offense from the statute. To the contrary, when a single act violates multiple statutes, the prosecution is given discretion in its charging decision as long as the offenses and penalties are sufficiently clear.[36] That prosecutors might often elect to charge the felony in no way makes the misdemeanor charge surplusage as a matter of law.[37]

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manner, the defense referred us to the facts of *Duncan*, 402 Mich 1. Because the Court in *Duncan* did not consider the legal question before us, we consider *Duncan*'s facts only as a hypothetical. If we apply defendant's taint theory to those facts, however, we are not sure that even the charge in *Duncan* could survive. That case involved returning property to its rightful owner, which, of course, is *generally* a legal act. But, *on the facts of that case* (on which defendant would have us focus) it was to be returned only after a bribe had been paid. The return, then, being tainted by the bribe, might be better described not as a lawful act, but as the final step in an extortion. That it would have been worse to have received the bribe and then to have kept the property does not remove the taint. We are left, therefore, skeptical that any "legal act" conspiracy charge could survive on defendant's reading of the statute.

[36] See *People v Ford*, 417 Mich 66, 100; 331 NW2d 878 (1982), citing *United States v Batchelder*, 442 US 114, 126; 99 S Ct 2198; 60 L Ed 2d 755 (1979).

[37] In any event, it is by no means clear that prosecutors will always or often elect the felony charge. The scarcity of appellate cases arising

Finally, defendant argues that, in circumstances not present in this case, a ruling for the prosecution would permit future prosecutors to broaden the goals of the conspiracy when charging under MCL 750.157a(d) such that *any* conspiracy could be charged as a felony under the statute. We think the risk exaggerated. Defendant forgets that the crime of conspiracy *is* the agreement.[38] Therefore, the prosecutor does not define the scope of the conspiracy: the conspirators do. Because one of the elements of MCL 750.157a(d) is the conspiracy, the prosecution must prove beyond a reasonable doubt, either by direct or circumstantial evidence,[39] that the conspirators agreed both to commit a legal act and to do it in an illegal manner. The prosecution may not obtain a conviction simply by asserting that some legal act was the aim of the conspiracy; it must prove, beyond a reasonable doubt, an agreement to it. In this case, there is certainly probable cause to believe that the conspirators agreed to the legal act charged, given that defendant has testified under oath that they agreed to sign the petitions "for the purpose of having [the] signatures included in" the Secretary of State's count for the nomination and that Yowchuang similarly testified that the purpose for agreeing to do so was "to make [the] signatures count towards the nomination[.]"

V. CONCLUSION

The district court properly found that the prosecution presented sufficient evidence to establish probable

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under the "legal act" prong of the conspiracy statute suggests that it has not heretofore been a popular charge, despite being available since before the adoption of our criminal code. In the exercise of sound discretion, prosecutors might well elect to charge the misdemeanor offense alone or in combination with a felony.

[38] *Asta*, 337 Mich at 611.

[39] See *People v Kanar*, 314 Mich 242, 249-250; 22 NW2d 359 (1946).

cause that defendant committed the felony of conspiracy to commit a legal act in an illegal manner. We therefore reverse the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for it to reinstate the bindover decision of the 16th District Court and for further proceedings consistent with this opinion. We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with LARSEN, J.

WYANDOTTE ELECTRIC SUPPLY COMPANY v ELECTRICAL TECHNOLOGY SYSTEMS, INC

Docket No. 149989. Argued November 5, 2015 (Calendar No. 3). Decided May 3, 2016.

Wyandotte Electric Supply Company (Wyandotte) brought an action in the Wayne Circuit Court against Electrical Technology Systems, Inc. (ETS), KEO & Associates, Inc. (KEO), and Westfield Insurance Company (Westfield). KEO was the principal contractor for a renovation project at the Detroit Public Library. Westfield provided a surety bond for the project in accordance with the public works bond act (PWBA), MCL 129.201 *et seq*. KEO subcontracted with ETS to provide labor and materials for the project, and ETS, in turn, subcontracted with Wyandotte for materials. Over the course of the library project, ETS only paid Wyandotte sporadically. Wyandotte filed a claim with Westfield, seeking to recover on the payment bond. Westfield denied the claim, and Wyandotte subsequently brought this action. ETS defaulted, and Wyandotte moved for summary disposition against KEO and Westfield. The court, Robert J. Colombo, Jr., J., granted Wyandotte's motion in part, concluding that there was a valid bond claim given that Wyandotte had complied with the notice requirements of the PWBA and that Wyandotte could recover a time-price differential as well as attorney fees. A bench trial was then held on the question of damages. The court found that the unpaid balance owed to Wyandotte was $154,343.29, that Wyandotte was entitled to a total time-price differential of $76,403.44, and that Wyandotte was entitled to $30,000 in attorney fees. Wyandotte moved for entry of judgment and further requested postjudgment interest under MCL 600.6013(7). The court granted the motion over the objections of KEO and Westfield and entered a judgment in the total amount of $272,927.70. KEO and Westfield appealed. The Court of Appeals, BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ., affirmed the judgment of the trial court in an unpublished opinion per curiam. KEO and Westfield then sought leave to appeal. The Supreme Court granted leave. 497 Mich 958 (2015).

In an opinion by Justice BERNSTEIN, joined by Justices MARKMAN, MCCORMACK, VIVIANO, and LARSEN, the Supreme Court *held*:

1. Under MCL 129.207 of the PWBA, a claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) the claimant has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) the claimant has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by certified mail, postage prepaid. In this case, KEO asserted that Wyandotte failed to properly serve KEO because KEO never received the 30-day notice. The plain language of the statute, however, does not require actual receipt of the notice. Wyandotte sent the 30-day notice through certified mail as required by the statute. When a claimant has complied with the notice procedures set forth by the Legislature in MCL 129.207, there is no actual-notice requirement.

2. MCL 129.207 of the PWBA permits an unpaid supplier of materials or labor to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due the claimant, and have execution thereon. Wyandotte sought payment based on its prior contracts with ETS: an open-account agreement entered into in 2003, the bid Wyandotte made for the Detroit Public Library project in 2009, and the ensuing purchase orders. Wyandotte argued that it was entitled to the unpaid balance for the materials it had provided as well as further damages under time-price-differential and past-due-accounts provisions in the open-account agreement. Contractual privity is not a requirement for recovery under MCL 129.207, so the fact that KEO and Westfield did not agree to those provisions was immaterial. The dispositive question was whether amounts due under the time-price-differential and past-due-accounts provi-

sions were part of the sum justly due to Wyandotte under the statute. The sum justly due under MCL 129.207 is the amount provided for in the claimant's contract. At the time Wyandotte commenced this action, ETS had already fallen behind on its payments to Wyandotte for the materials Wyandotte had provided in connection with the library project. The time-price differential referred to in the contracts between Wyandotte and ETS was in play, reflecting the increased cost to Wyandotte as ETS's bills went underpaid or unpaid. Therefore, a time-price differential was part of the amount unpaid and due to Wyandotte when it instituted the instant action, and the trial court properly included the time-price differential as part of the judgment in Wyandotte's favor. The past-due-accounts provision stated that if ETS's account was placed into the hands of an attorney for collection after default, ETS agreed to pay 33% of the unpaid balance for attorney fees together with applicable costs. The open-account agreement containing the provision covered all of ETS's past, present, and future unpaid accounts receivable balances with Wyandotte. Thus, the terms of the open-account agreement clearly indicated that ETS and Wyandotte intended that the past-due-accounts provision would apply for the duration of their ongoing business relationship, and it was not improper for the trial court to include attorney fees in its judgment as part of the sum justly due. Accordingly, in this case, Wyandotte was entitled to the time-price differential and attorney fees it would have received under its contracts with ETS.

3. Under MCL 600.6013(7), if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument. In this case, the judgment was not rendered on a written instrument. Although the contract between Wyandotte and ETS defined the scope of the damages that Wyandotte was entitled to seek under the PWBA, the underlying claim was not a contract claim. Wyandotte's cause of action did not arise directly out of its contract; it arose out of the PWBA. Therefore, even though the contract between ETS and Wyandotte determined the extent of Wyandotte's recovery, judgment was rendered on Wyandotte's statutory claim rather than on the contract itself. Interest on the judgment should have been calculated under MCL 600.6013(8), the general rule for interest on a money judgment in a civil case.

Court of Appeals judgment regarding sufficiency of the notice and the recovery of attorney fees and a time-price differential

affirmed. Court of Appeals judgment regarding postjudgment interest reversed. Case remanded to the trial court for further proceedings.

Chief Justice YOUNG, concurring in part and dissenting in part, agreed with the majority that Wyandotte complied with the notice requirements of MCL 129.207 and that a time-price differential was recoverable under the statute, but would have held that the attorney fee award was not integrally related to the price of the materials Wyandotte furnished, so the attorney fee award was not recoverable as a sum justly due within the meaning of the PWBA. Chief Justice YOUNG also dissented from the majority's reasoning regarding the award of postjudgment interest. MCL 129.207 only makes compensable the unpaid costs of labor or materials furnished. Thus, the statute limits a claimant's recovery to the contractual terms that are related to the price of labor or materials furnished. While both the time-price-differential and the past-due-accounts provisions were in Wyandotte's agreement with ETS, only the former actually related to the cost of furnishing the materials. In addition, the PWBA limits the claimant's recovery based on when certain price terms are triggered; to be recoverable, the price term must be triggered before the expiration of 90 days after the last of the materials are supplied or labor furnished. The time-price-differential provision was triggered before Wyandotte gave its 90-day notice. Accordingly, Wyandotte could recover the time-price differential. In contrast, the attorney fee was not closely associated with the cost of materials furnished for the library project. The past-due-accounts provision created a penalty for collection efforts rather than determining Wyandotte's expectancy. Because this provision described a liquidated collection cost rather than a cost of the materials, the attorney fees set forth in the provision were not part of the sum justly due. In addition, the past-due-accounts provision was not triggered by the 90-day deadline given that Wyandotte did not file suit until well after the 90-day deadline had passed. The trial court, therefore, erred by awarding attorney fees. Finally, the majority mistakenly concluded that the judgment was rendered on the PWBA rather than on a written instrument. The agreement between Wyandotte and ETS was as much the basis for the trial court's judgment as the statute, so the judgment was rendered on a written instrument. Nonetheless, MCL 600.6013(7) did not apply because the underlying agreement did not evidence indebtedness. Therefore, the general interest rate set forth in MCL 600.6013(8) applied, but not for the reason stated by the majority.

Justice ZAHRA, concurring in part and dissenting in part, agreed that the notice provided by Wyandotte was sufficient and that MCL 600.6013(8) governed the calculation of postjudgment interest, but disagreed with the majority's reasoning regarding the calculation of interest and also did not agree that Wyandotte could claim attorney fees and a time-price differential under the payment bond. Simply because a remote subcontractor may sue on a payment bond under MCL 129.207 does not suggest that its claim is determined by a contract to which the principal contractor who furnished the payment bond was not a party. Under Michigan law, a remote contractor's claim arises solely under the PWBA, which alone forms the basis to assess its claim. MCL 129.207 does not suggest that the principal contractor must wholly indemnify claimants under the PWBA. MCL 129.207 provides, in regard to remote subcontractors, that the claimant must provide notice within 90 days from the date on which the claimant performed the last of the labor, or furnished or supplied the last of the materials, for which the claim is made, stating with substantial accuracy the amount claimed. This notice identifies the labor and materials that the remote contractor has supplied. The sum justly due thus includes the labor and materials identified in the 90-day notice that the claimant has supplied but for which the claimant has not been paid. The majority departed from the statutory language by imposing liability for the amount provided for in the claimant's contract, regardless of whether the principal contractor and its surety agreed to that contract's terms. Further, the majority holds that judgment was rendered on Wyandotte's statutory claim rather than on the contract itself. This holding missed the entire point of the PWBA. MCL 129.207 expressly provides that a claimant may sue on the payment bond, but, in this case, neither the payment bond nor the contract between KEO and the library incorporated by the payment bond contained a specified interest rate. Accordingly, the majority reached the correct result when it concluded that interest on the judgment had to be calculated based on MCL 600.6013(8).

1. NOTICE — ACTIONS — PUBLIC WORKS BOND ACT.

Under MCL 129.207 of the public works bond act, notice must be served by mailing the same by certified mail, postage prepaid; there is no actual-notice requirement.

2. ACTIONS — PUBLIC WORKS BOND ACT — SUM JUSTLY DUE.

MCL 129.207 of the public works bond act permits an unpaid supplier of materials or labor to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution

of the civil action, prosecute such action to final judgment for the sum justly due the claimant, and have execution thereon; the sum justly due under MCL 129.207 is the amount provided for in the claimant's contract.

3. INTEREST — JUDGMENTS — PUBLIC WORKS BOND ACT.

Under MCL 600.6013(7), if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument; a judgment rendered under the public works bond act (PWBA), MCL 129.201 *et seq*., is not rendered on a written instrument, and interest on a PWBA judgment must be calculated under MCL 600.6013(8), the general rule for interest on a money judgment in a civil case.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Brian T. Quinn*) for Wyandotte Electric Supply Company.

Cavanaugh & Quesada, PLC (by *Peter J. Cavanaugh* and *Gary Quesada*), for KEO & Associates, Inc., and Westfield Insurance Company.

Deneweth, Dugan & Parfitt, PC (by *Ronald A. Deneweth* and *Anthony Vittiglio II*), for Westfield Insurance Company.

Amicus Curiae:

Facca, Richter & Pregler, PC (by *Patrick A. Facca*), for the Associated General Contractors of Michigan.

BERNSTEIN, J. This case concerns several facets of the public works bond act (PWBA), MCL 129.201 *et seq*. First, it poses the question of whether actual notice is required for a sub-subcontractor to recover on a payment bond when that sub-subcontractor has complied with the notice requirements set forth in MCL 129.207. Second, the case raises the question of whether a

PWBA claimant may recover a time-price differential and attorney fees that were provided for by the claimant's contract with a subcontractor, but were unknown to the principal contractor holding the payment bond as well as the principal's surety. Finally, we consider what postjudgment interest is appropriate under the PWBA. We hold that the PWBA contains no actual notice requirement for claimants that comply with the statute, that the trial court properly awarded a time-price differential and attorney fees on past-due invoices to plaintiff Wyandotte Electric Supply Company (Wyandotte), and that the trial court erred in awarding postjudgment interest under MCL 600.6013(7). Accordingly, we affirm the judgment of the Court of Appeals with regard to the first two issues and reverse with regard to the third. We remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 2009 and 2010, the south wing of the Detroit Public Library was renovated. Defendant KEO & Associates, Inc. (KEO) was the principal contractor for this project. Defendant Westfield Insurance Company (Westfield) supplied KEO with a payment bond worth $1.3 million, as required by the PWBA. KEO was identified as the principal contractor and Westfield as the surety on the bond. KEO subcontracted with defendant Electrical Technology Systems, Inc. (ETS) to provide labor and materials for electrical work. The agreement between KEO and ETS included a pay-if-paid clause, obliging KEO to pay ETS only after KEO had been paid for the relevant portion of work performed.

ETS in turn subcontracted with Wyandotte for materials and supplies, making Wyandotte a sub-subcontractor from KEO's perspective. ETS and Wyandotte first formed a relationship in 2003, when they entered into an "open account" agreement that governed ETS's purchases from Wyandotte. Under this agreement, ETS was to pay a "[t]ime price differential" of 1.5% per month (18% per annum) on invoices unpaid after 30 days.[1] For the Detroit Public Library project, ETS solicited a quote from Wyandotte. On August 13, 2009, Wyandotte submitted a quote that included the 1.5% time-price differential provision. On February 19, 2010, ETS accepted the quote by issuing a purchase order totaling $143,613.25. Wyandotte first delivered materials to ETS for the project on March 3, 2010. Over the course of the project, ETS paid Wyandotte only sporadically, and the unpaid balance grew. Initially, Wyandotte supplied materials on credit and credited ETS's payments to the oldest outstanding balance, but eventually Wyandotte began to ship materials only for cash on delivery. The last shipment with an unpaid balance was delivered on or about July 22, 2010; Wyandotte continued making deliveries on a cash basis until September 30, 2010.

On March 3, 2010, when it began work on the library project, Wyandotte sent letters to KEO and Westfield

[1] The term "time-price differential" refers to the difference between the current cash price of an item and the cost of purchasing the item with credit. A payment made with cash is immediate; a payment made with credit is not. Thus, when a payment is made with credit, the seller is burdened by a cash-flow interruption. A time-price differential compensates for the increased cost to a seller for credit. It reflects the difference between the credit price and the cash price. *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369, 377; 304 NW2d 584 (1981), citing *Silver v Int'l Paper Co*, 35 Mich App 469, 470; 192 NW2d 535 (1971). Despite the contract provision, Wyandotte's business practice was to wait 60 days to pursue the time-price differential.

asking for a copy of the payment bond related to the library renovation project. The letter, on Wyandotte's letterhead, referred to the "Detroit Public Library South Wing with [ETS.]" According to Wyandotte, KEO provided a copy of the payment bond the next day. One week later, on March 10, 2010, Wyandotte sent KEO a 30-day "Notice of Furnishing" in accordance with MCL 129.207, explaining that it was one of ETS's suppliers. Wyandotte also sent copies of the letter to Westfield, the library, and ETS. As specified by MCL 129.207, Wyandotte sent these notices by certified mail. Additionally, Wyandotte sent the notices with return receipts requested. The notices to Westfield, ETS, and the library were all received. It is unclear what happened to the notice sent to KEO—United States Postal Service tracking indicated that it was at the Detroit Post Office on March 13, 2010, but it apparently never reached its destination. KEO states that it never received the 30-day notice. Again in accordance with the requirements of MCL 129.207, Wyandotte provided a 90-day notice of furnishing on November 1, 2010, to KEO, Westfield, ETS, and the library, stating that its last day of furnishing materials had been September 30, 2010.

Throughout the renovation project, KEO made progress payments to ETS totaling more than $248,000,[2] but ETS was not fully paying Wyandotte. KEO claims not to have been aware of Wyandotte's involvement in the project before receiving the 90-day notice in November 2010. After receiving the 90-day notice from Wyandotte, KEO requested information from ETS confirming payments in the form of a sworn statement.

[2] KEO claims to have paid more than it owed; ETS claims that KEO failed to pay what it owed to ETS. In any case, Wyandotte undisputedly did not receive full payment.

According to KEO, ETS provided a falsified sworn statement averring that Wyandotte had been paid $80,000. In January 2011, KEO terminated its subcontract with ETS, citing an abandonment of the project.

On January 28, 2011, Wyandotte filed a claim directly with Westfield to recover on the payment bond. Westfield denied the claim, asserting a lack of liability. Consequently, on March 14, 2011, Wyandotte filed suit against ETS, KEO, and Westfield. KEO filed a cross-claim against ETS on March 29, 2011. ETS had apparently gone out of business, and its president had declared personal bankruptcy, so it failed to appear and was defaulted. Wyandotte continued to pursue claims against KEO and Westfield on the basis of the surety bond.[3]

On September 7, 2011, Wyandotte moved for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a complaint. The trial court heard oral argument on whether there was a valid bond claim when KEO had not received the 30-day notice of furnishing and whether Wyandotte could recover the 1.5% time-price differential and attorney fees on a bond claim. On November 4, 2011, the trial court granted Wyandotte's motion in part, concluding that there was a valid bond claim because Wyandotte had complied with the notice requirements and that Wyandotte could recover the time-price differential as well as attorney fees. The only remaining issue was the amount of damages, and a bench trial was held on that narrow question. The trial court found that the unpaid balance owed to Wyandotte was $154,343.29, that Wyandotte was entitled to a total time-price differen-

[3] Because KEO and Westfield's financial interests with respect to this project are aligned, they have filed joint arguments in this appeal. We refer to them jointly as "defendants" throughout this opinion.

tial of $76,403.44, and that Wyandotte was entitled to $30,000 in attorney fees.[4] Wyandotte moved for entry of judgment and further requested postjudgment interest under MCL 600.6013(7). The trial court granted the motion over defendants' objections and entered a judgment in the total amount of $272,927.70.[5] The Court of Appeals affirmed the judgment in an unpublished opinion.

II. NOTICE UNDER THE PWBA

Defendants first contend that Wyandotte did not have a cause of action against them because KEO did not receive Wyandotte's 30-day notice. We review a trial court's summary disposition order de novo. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). Likewise, questions of statutory interpretation are subject to review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). When interpreting a statute, our foremost rule of construction is to discern and give effect to the Legislature's intent. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015). Because the language chosen is the most reliable indicator of that intent, we enforce clear and unambiguous statutory language as written, giving effect to every word, phrase, and clause. *Id*. at 345-346.

Traditionally, public property cannot be the subject of a lien unless a statute specifically permits it. *Knapp v Swaney*, 56 Mich 345, 347; 23 NW 162 (1885). The Legislature enacted the PWBA to protect contractors

[4] The attorney fees award was agreed to by the parties and was less than the attorney fees provided for in the contract.

[5] The final award also included, under MCR 2.403(O), $12,180.97 for fees and costs arising out of defendants' rejection of a case evaluation.

and suppliers working on public projects who, unlike their private-works counterparts, have no recourse when other contractors default on their obligations. *Adamo Equip Rental Co v Mack Dev Co, Inc*, 122 Mich App 233, 236; 333 NW2d 40 (1982), citing *Ford v State Bd of Ed*, 166 Mich 658; 132 NW 467 (1911). While contractors and suppliers can place mechanics' liens on private projects, the PWBA protects those workers on public projects by requiring the principal contractor on a public project valued at $50,000 or more to obtain a payment bond. MCL 129.201. Payment bonds serve to protect subcontractors in privity with a principal contractor, as well as remote sub-subcontractors like Wyandotte, who are not fully compensated for their contributions to a public project. MCL 129.203. The principal contractor who obtains the bond, as well as the principal's surety if applicable, is liable to compensate suppliers of labor or materials. *Id*.

MCL 129.207 provides for recovery under a principal contractor's payment bond, but prescribes a two-step notice procedure for a remote party from the principal contractor's perspective, that is, one lacking a direct contractual relationship with the principal contractor:

> A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the

> last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence.

Defendants' argument is that there can be no liability under the PWBA because KEO never actually received the 30-day notice—i.e., there was a failure of service.[6] In essence, defendants ask us to read an actual notice requirement into MCL 129.207. We decline to do so. First, we consider the plain language of the statute. Because "served" in this context is a technical word with a specific meaning in the law, we refer to that technical meaning. MCL 8.3a. "Serve" means "[t]o make legal delivery of (a notice or process)" or "[t]o present (a person) with a notice or process as required by law[.]" *Black's Law Dictionary* (10th ed). Therefore, the word "served," as used in this statute, in itself does not implicate any substantive requirements; it merely compels compliance with the relevant law.

Furthermore, service of notice is mandatory under MCL 129.207, because the statute declares that a party "shall not have a right of action upon the payment bond unless" the two notices are provided and states that the two notices "shall inform" the specified parties of certain information. However, the Legislature did not specify that actual receipt of notice is a requirement of the PWBA, although it has done so in other statutes. Some statutes mandate that a party provide service by taking actions "reasonably calcu-

[6] Defendants do not argue in this Court that Wyandotte failed to serve the 90-day notice required by MCL 129.207.

lated to give actual notice . . . .” See, e.g., MCL 125.2335(3); MCL 445.1539; MCL 487.3224(1). Others expand upon delivery directions, requiring that mailed notice be sent return-receipt demanded or that some additional step be taken to prove that notice was given. See, e.g., MCL 168.711 (requiring service by “registered or certified mail, with a return receipt demanded”); MCL 213.181 (requiring service by “registered mail, and a return receipt demanded”); MCL 500.2034 (requiring “the return postcard receipt for” a statement served under the statute as proof of service); MCL 290.725(3) (“The verified return of service shall be proof of the service . . . .”). The Legislature elected not to impose such a burden in MCL 129.207.

Defendants ask us to overlook the fact that Wyandotte sent its 30-day notice of furnishing via certified mail, return-receipt requested, and render a decision based on the fact that KEO did not receive that notice.[7] The rules of statutory construction demand that this Court “ ‘give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.’ ” *People v Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). In addition to the portions of the statute requiring notice, MCL 129.207 specifies that “notice shall be served by

[7] At oral argument, defendants additionally suggested that service with return-receipt requested was not in conformity with MCL 129.207. We do not find compelling defendants’ contention that Wyandotte failed to comply with the statute when it took the additional precaution of sending its correspondence return-receipt requested. The plain language of MCL 129.207 does not require a return receipt, and we decline to read such language into the statute. But we also do not believe that a party that requests a return receipt when sending notice by certified mail is not entitled to a right of action on a payment bond under MCL 129.207.

mailing the same by certified mail, postage prepaid . . . ." To accept defendants' argument would render that phrase nugatory. In order to give effect to this phrase, we must conclude that service is accomplished when a complainant mails the required information to the proper destination by certified mail within the required time frame.

This Court previously considered the notice requirements of the PWBA in *Pi-Con, Inc v A J Anderson Constr Co*, 435 Mich 375; 458 NW2d 639 (1990). Defendants maintain that this Court held in *Pi-Con* that the PWBA contains an actual notice requirement. In *Pi-Con*, a supplier of materials and services to a subcontractor on a public works project sent its notice of furnishing to the principal contractor via ordinary first-class mail rather than, as required by statute, by certified mail. *Id*. at 378-380. The *Pi-Con* Court reviewed the United States Supreme Court's construction of the Miller Act, 40 USC 3131 *et seq*., the federal analog to the PWBA, in *Fleisher Engineering & Constr Co v United States ex rel Hallenbeck*, 311 US 15; 61 S Ct 81; 85 L Ed 12 (1940), in which the Supreme Court observed:

> We think that the purpose of this provision [notice by certified mail requirement] as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown. [*Id*. at 19.]

Guided by the analysis in *Fleisher*, the *Pi-Con* Court concluded that service by first-class mail does not preclude recovery under the PWBA as long as the plaintiff can prove the defendant's actual receipt of the notice by a preponderance of the evidence. *Pi-Con*, 435 Mich at 378.

Defendants refer to the following portion of *Pi-Con* to support their contention that the PWBA contains an actual notice requirement:

> First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate "the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identify[] the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials . . . ." Third, the notice sent must have been written. Fourth, the notice must have been received within the time limits prescribed by the statute. [*Id*. at 382 (citation omitted; alteration in original).]

But the factual underpinnings of *Pi-Con* are dissimilar to those in this case, and those dissimilarities affect our approach to the PWBA's notice requirements. *Pi-Con* and the other Michigan cases that have previously addressed the notice requirement of MCL 129.207 all involved parties who failed to employ the statutorily prescribed delivery method—certified mail. See, e.g., *Pi-Con*, 435 Mich at 380 (notice sent by ordinary first-class mail); *Thomas Indus, Inc v C & L Electric, Inc*, 216 Mich App 603, 605-608; 550 NW2d 558 (1996) (no notice mailed but all required information included on packing slips with shipments of materials). In this case, by contrast, the parties do not dispute that Wyandotte sent notice via certified mail, although KEO apparently did not receive it. In this

situation, Wyandotte complied with the statute, which contains no actual notice requirement.

We reaffirm the continuing application of *Pi-Con*'s rule in cases in which a would-be PWBA claimant fails to comply with the particular method of service specified in MCL 129.207. To deny a PWBA claim when a preponderance of the evidence demonstrates that notice was actually received would improperly "elevat[e] form over substance." *Pi-Con*, 435 Mich at 385. Similarly, it would be more than passing strange to penalize a claimant for complying with the notice provisions outlined in the statute, as Wyandotte has done here. We conclude that, when a claimant has complied with the notice procedures set forth by the Legislature in MCL 129.207, there is no actual notice requirement.

III. RECOVERABILITY OF A TIME-PRICE DIFFERENTIAL AND ATTORNEY FEES[8]

In prevailing on its PWBA claim, Wyandotte was awarded a judgment in the trial court that included a time-price differential and attorney fees, which had been provided for in its contract with ETS. To the extent that this issue is one of statutory interpretation of the PWBA, we review it de novo. *Elba Twp*, 493 Mich at 278. To the extent that it involves interpreting the contract between Wyandotte and ETS, this is also a question subject to review de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Our

[8] We acknowledge that there may be an issue with regard to whether the "attorney fees" requested by Wyandotte are appropriately referred to as such. In this case, the term "attorney's fees" arises out of a "PAST DUE ACCOUNTS" provision in ETS's open-account agreement with Wyandotte and differs from a traditional attorney fees provision. For the sake of simplicity, we follow the language used in the contract, and by the parties and the Court of Appeals, in continuing to use the term "attorney fees."

goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself. *Id*. at 468.

The PWBA permits an unpaid supplier of materials or labor to "sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon." MCL 129.207. Wyandotte sought payment based on its prior contracts with ETS: the open-account agreement enacted in 2003, the bid Wyandotte made for the Detroit Public Library project in 2009, and the ensuing purchase orders. Wyandotte argued, and the lower courts agreed, that Wyandotte was entitled to the unpaid balance on the materials and supplies it had provided as well as further damages based on the following two provisions that appeared in the open-account agreement:

> TIME PRICE DIFFERENTIAL Time price differential charges of 1½% per month (18% per annum) are calculated on all invoices that are not paid and past due 30 days or more. You will be issued a separate invoice detailing these (finance) charges.
>
> * * *
>
> PAST DUE ACCOUNTS Accounts that are past due will be taken off open account and placed on C.O.D. until their account is brought back into current status. In the event your account is placed in the hands of an attorney for collection after default, the customer agrees to pay 33% of the unpaid balance for attorney's fees together with applicable costs.

The time-price differential provision also appeared on the quote for the library project.

As an initial matter, defendants maintain that they cannot be liable for either type of fee because they were not in contractual privity with Wyandotte and never agreed to pay these fees. This privity argument is unpersuasive. Contractual privity is plainly not a requirement for recovery under MCL 129.207, which specifically allows a "claimant not having a direct contractual relationship with the principal contractor" to seek recovery on the payment bond. Defendants' privity argument would strip away the PWBA's protection of remote contractors.

The dispositive question here is rather the meaning of "sum justly due" in MCL 129.207. The statute merely states that a complainant may sue "on the payment bond for the amount, or the balance thereof, unpaid" and that a final judgment may be rendered for the "sum justly due . . . ." MCL 129.207. Neither of these phrases explicitly informs us whether the Legislature intended to encompass additional contractual provisions, such as time-price differential fees or attorney fees, as part of the sum justly due.[9]

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[9] We recognize Chief Justice YOUNG's argument in his partial dissent that MCL 129.207 limits a claimant to recovery of a sum "integrally related to the cost of labor or materials furnished for the project." We find no statutory support for this conclusion. Contrary to his reading of MCL 129.207, the language "[a] claimant who has furnished labor or material in the prosecution of the work provided for in such contract" merely serves to identify who may make a claim under the PWBA—a party who has furnished labor or materials. It does not by its plain language place a limit on what such a claimant may seek to recover.

Moreover, we discern little reason for distinguishing between (1) the materials price itself; (2) the time-price differential provision, which is related to the materials price; and (3) the attorney fees provision, which also constitutes part of the contract bid. Wyandotte's decision to actually price materials at a particular level in the contract bid was presumably a function of all the other contract provisions, including those pertaining to the time-price differential and attorney fees. That is, Wyandotte presumably adjusted its materials price downward, at least to some

The Court of Appeals considered the scope of the phrase "sum justly due" under the PWBA in *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369; 304 NW2d 584 (1981). The plaintiff in *Price Bros* was retained by a contractor on a public works project to provide sewer pipe for installation. The two contracts at issue related to the sewer pipe project and contained the following clause:

> Payment shall be due 30 days after the date of the statement. A service charge of 1½ percent per month on the unpaid balance will be due on all amounts unpaid for 30 days after the due date. A 5% cash discount is applicable if paid within 30 days of the date of statement providing no other indebtedness to Price Brothers Company is delinquent. [*Id*. at 376.]

The Court of Appeals considered whether the service charge constituted a separate extension of credit or a "flexible price factor employed to reflect plaintiff's increased costs when its bills are not paid promptly."

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degree, on the assumption that all contract provisions would be given effect, and it would likely have quoted a higher materials price in the bid if it did not have the reasonable assurance that it would be reimbursed at a certain rate for delinquent payments (time-price differential) or for litigation required to satisfy outstanding debt (attorney fees). Accordingly, the attorney fees provision is not detached from the materials price; rather, it and the materials price are interrelated, just as the time-price differential provision and the materials price are interrelated. Given that Wyandotte is entitled to recover the materials price and the time-price differential, we believe Wyandotte is entitled to recover attorney fees as well.

We also note that our conclusion is consistent with how several federal circuits have interpreted the Miller Act. See *United States ex rel Maddux Supply Co v St Paul Fire & Marine Ins*, 86 F3d 332, 336 (CA 4, 1996) ("The Miller Act does not, by its own terms, provide for attorney's fees or interest. Several circuits have held, however, that interest and attorney's fees are recoverable if they are part of the contract between the subcontractor and supplier.").

Id. at 377. The *Price Bros* Court concluded that the service charge fell into the latter category and was recoverable under the PWBA as an "integral part of the cost of the transaction" and an "integral part of the contract between [the parties]." *Id*. at 377, 379. However, the *Price Bros* Court did not provide any justification for the use of this standard or consider other approaches to understanding the term "sum justly due." We therefore do not find it clarifying in this case.

Wyandotte's position, and that adopted by the Court of Appeals, is that the sum justly due for PWBA purposes is the amount provided for in the claimant's contract, regardless of whether the principal contractor and its surety have agreed to that contract's terms. An alternative position is to use the value of the labor or materials. We conclude that the former approach is more consistent with the plain language of the PWBA, which refers to the "amount . . . unpaid" at the time of institution of the action and does not expressly state (or limit) what kinds of damages are recoverable. This phrase implies a previous expectation of payment of a certain sum. In the absence of any further direction from the Legislature regarding how the amount unpaid ought to be determined, the most logical recourse is to the claimant's underlying contract, which best illustrates the intent and expectations of the parties to the contract. The Legislature does not differentiate the amount unpaid from the sum justly due, and we understand that sum to be determined based on the trial court's fact-finding as to the amount unpaid.

Because we use the contract to determine the sum justly due, we must ascertain what actually constituted the contract in this case. There were multiple written instruments evidencing the agreement between Wyandotte and ETS: the open-account agree-

ment dating back to 2003, the quote for the library project, and the purchase orders related to the project. In our recent opinion in *Beck v Park West Galleries, Inc*, 499 Mich 40; 878 NW2d 804 (2016), we acknowledged the general rule that separate agreements are treated separately. However, when parties enter into multiple agreements relating to the same subject-matter, we must read those agreements together to determine the parties' intentions. *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983), citing *Reber v Pearson*, 155 Mich 593; 119 NW 897 (1909). Although the initial open-account agreement does not relate specifically to the library project, all of these agreements are directed to the same end—Wyandotte's provision of materials to ETS. Further, by its terms, the open-account agreement covered all "past, present and future unpaid accounts receivable balances" between Wyandotte and ETS. Together, these agreements demonstrate that Wyandotte and ETS intended to enter into an ongoing business relationship, and these agreements define the scope of that relationship. We therefore conclude that these agreements should be considered together.

The open-account agreement includes provisions regarding both a time-price differential and attorney fees. The later quote for the library project reiterated the time-price differential provision but was silent regarding attorney fees. But because the quote did not contradict the attorney fees clause present in the initial agreement, we conclude that the documents are not inconsistent and that the later quote and purchase orders did not supersede the initial agreement. See *Culver*, 126 Mich App at 828. Accordingly, both the open-account agreement and the subsequent agreements relating specifically to the library project apply here.

We do not believe that a PWBA claimant's recovery is limited to the terms of a contract or contracts relating to the provision of labor and materials for a specific public works project when additional contracts also govern the parties' relationship with regard to that project. To the extent that the PWBA refers to public works project contracts, it refers to the primary contract between a principal contractor and a governmental unit. For example, MCL 129.201, which obliges a principal contractor to obtain a payment bond, only discusses this primary contract. Similarly, MCL 129.203 provides:

> The payment bond shall be in an amount fixed by the governmental unit but not less than 25% of *the contract* amount solely for the protection of claimants, as defined in [MCL 129.206], supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in *the contract*. [Emphasis added.]

See also MCL 129.202. As with MCL 129.201, the phrase "the contract" in MCL 129.203 must refer to the primary contract between a principal contractor and a governmental unit. MCL 129.203 directs the *principal contractor* to obtain a payment bond; in stating that the payment bond shall be in an amount not less than 25% of the contract amount, the statute clearly indicates that the term "the contract" refers to the primary contract, because the principal contractor does not obtain separate payment bonds for each lesser contract with a subcontractor. Therefore, the discussion in MCL 129.207 of "[a] claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of [MCL 129.203]" refers to that primary contract yet again. It does not limit a PWBA *claimant's* reasonably expected recovery when the claimant is a sub-subcontractor.

A sub-subcontractor is, by definition, not a party to the primary contract. Given that the PWBA does not require a sub-subcontractor to be in privity of contract with the principal contractor in order to obtain relief, we hold that the PWBA allows a sub-subcontractor to rely on the terms of the agreement or agreements that govern its relationship with a subcontractor. There are, of course, scenarios in which a contract predating the specific public works project would properly be disregarded under the PWBA: namely, when the prior contract is limited in scope and has no bearing on either the public works project or any continuing contractual relationship between the involved parties. However, where, as here, the language of an earlier contract indicates that ETS and Wyandotte intended it to govern their ongoing business relationship, we consider it alongside the specific contracts relating to the public works project.

At the time Wyandotte commenced this action, ETS had already fallen behind on its payments to Wyandotte for the materials it had provided in connection with the library project. The time-price differential referred to in the contracts between Wyandotte and ETS was in play, reflecting the increased cost to Wyandotte as ETS's bills went underpaid or unpaid. Therefore, a time-price differential was part of the amount unpaid and due to Wyandotte when it instituted the instant action against defendants. The trial court properly included the time-price differential as part of the judgment in Wyandotte's favor.

Regarding attorney fees, defendants correctly argue that Michigan follows the American rule, which provides that attorney fees are not to be awarded unless specifically provided for by a statute, rule, or contractual provision. *Watkins v Manchester*, 220 Mich App

337, 342; 559 NW2d 81 (1996). Defendants rely heavily on the fact that the PWBA does not expressly provide for an award of attorney fees, but fail to note that the open-account agreement did in fact have an attorney fees provision.[10] And, as noted previously, the agreement covered all of ETS's "past, present and future unpaid accounts receivable balances" with Wyandotte. Thus, the terms of the open-account agreement clearly indicate that ETS and Wyandotte intended that the attorney fees clause would apply for the duration of their ongoing business relationship. Therefore, it was not improper for the trial court to include attorney fees in its judgment as part of the sum justly due.[11]

We conclude that, because the underlying contract is the source by which we determine what relief a PWBA claimant may seek, Wyandotte is entitled to the time-

[10] As noted earlier in this opinion, the open-account agreement states that "[i]n the event [ETS's] account is placed in the hands of an attorney for collection after default, [ETS] agrees to pay 33% of the unpaid balance for attorney's fees together with applicable costs."

[11] Even though the parties have not raised this issue, in his partial dissent Chief Justice YOUNG contends that the attorney fees provision was not triggered before Wyandotte sent its 90-day notice to defendants and, therefore, Wyandotte cannot claim attorney fees. He argues that MCL 129.207 limits a claimant's potential recovery to the amount unpaid 90 days after supplying the last of the labor or materials in question. This argument fundamentally misunderstands the 90-day provision of MCL 129.207, which merely creates a notice requirement. It does not purport to preclude claimants from recovering damages that accrue after the 90-day notice is served. Chief Justice YOUNG's partial dissent implicitly recognizes this point by agreeing that the time-price differential is recoverable under the statute—including the amounts that accrued after Wyandotte sent its 90-day notice to KEO on November 1, 2010. This conclusion is made emphatically clear by the first sentence of MCL 129.207, which allows a claimant to seek "the amount, or the balance thereof, unpaid at the time of institution of the civil action," not the amount unpaid 90 days after the claimant ceased performance.

price differential and attorney fees it would have received under its contracts with ETS.

IV. INTEREST ON THE JUDGMENT

The trial court awarded, and the Court of Appeals affirmed, postjudgment interest to Wyandotte under MCL 600.6013(7), which provides:

> For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

Defendants contend that this was not the proper section under which to calculate interest on the judgment. We review this question of statutory interpretation de novo and seek to effect the Legislature's intent, turning first to the plain language of the statute. See *Elba Twp*, 493 Mich at 278.

MCL 600.6013(7) applies when certain criteria are met: the judgment must be "rendered on" a written instrument, the instrument must evidence indebtedness, and there must be a specified interest rate. This issue may be resolved based upon the first criterion. "Render" means, in relevant part, "to cause to be or become" and "to hand down (a legal judgment)." *Merriam-Webster's Collegiate Dictionary* (11th ed). To the extent that "render" is a technical legal term, to render means "to deliver formally" when undertaken

by a judge. *Black's Law Dictionary* (10th ed).[12] This restrictive term requires the written instrument to be the actual basis of the judgment for MCL 600.6013(7) to apply.

The judgment here was not rendered on a written instrument. Regardless of whether the documents evidencing the contract between Wyandotte and ETS can even be said to constitute *a* written agreement for purposes of interest on the judgment, the judgment in this case was not rendered on them. Although the contract between Wyandotte and ETS defined the scope of the damages that Wyandotte was entitled to seek under the PWBA, the underlying claim was not a contract claim.[13] Wyandotte's cause of action did not arise directly out of its contract; it arose out of the PWBA. Without the legislatively provided remedy of the PWBA, Wyandotte would not have had a claim against defendants. Therefore, even though the contract between ETS and Wyandotte determined the extent of Wyandotte's recovery, judgment was rendered on Wyandotte's *statutory* claim rather than on the contract itself. Because judgment was not rendered on a written instrument at all, we need not address whether the written instrument in this case evidenced indebtedness at a specified interest rate. Interest on the judgment should instead be calculated under MCL 600.6013(8), the general rule for interest on a money judgment in a civil case.

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[12] Because both the lay and legal dictionary definitions of "render" are substantially similar, we need not determine whether it is a legal term of art or a common term. See *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

[13] By contrast, Wyandotte's action directly against ETS, which ended in a default judgment, was a breach of contract claim. A judgment in such a case could be said to be rendered on the contract.

V. CONCLUSION

We conclude that MCL 129.207 did not require actual receipt of notice by the principal, that a time-price differential and attorney fees were part of the sum justly due to Wyandotte under its contracts, and that interest on the judgment should have been calculated under MCL 600.6013(8) rather than MCL 600.6013(7). Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals and remand to the trial court for entry of a judgment consistent with these holdings.

MARKMAN, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

YOUNG, C.J. (*concurring in part and dissenting in part*). This case addresses the issue of whether a claimant under the public works bond act (PWBA)[1] may recover a time-price differential and attorney fees that were permitted by its contract with a subcontractor, but were unknown to both the principal contractor and its surety. MCL 129.207 of the PWBA allows claimants to recover a sum justly due for labor and materials furnished on a public project. I concur in Parts I and II of the majority opinion. As to Part III, I agree with the majority opinion that the time-price differential is recoverable under the statute, but I would hold that the attorney fee award is not integrally related to the price of the materials Wyandotte Electric Supply Company (Wyandotte) furnished, so it is not recoverable as a sum justly due within the meaning of the PWBA. Accordingly, I dissent from Part III and would reverse that portion of the holding of the Court of Appeals that permitted plaintiff to recover attorney fees. Finally,

[1] MCL 129.201 *et seq*.

while I agree with the ultimate conclusion, I also dissent from the majority's reasoning in Part IV regarding the award of postjudgment interest. Wyandotte argues under MCL 600.6013(7) that the interest rate specified in its contract with Electrical Technology Systems, Inc. (ETS) applies, while defendants argue that the general interest rate in MCL 600.6013(8) controls. I disagree with the majority's reasoning, but I nonetheless concur with the majority's conclusion that the general interest rate under MCL 600.6013(8) applies.

I. FACTS AND PROCEDURAL HISTORY[2]

Defendant KEO & Associates, Inc. (KEO) was the principal contractor on a renovation project at the Detroit Public Library in 2009. As required under the PWBA, defendant Westfield Insurance Company (Westfield) supplied a payment bond and stood as surety on the bond.

KEO subcontracted with defendant ETS to provide labor and materials for electrical work on the renovation project. ETS then subcontracted with plaintiff Wyandotte for materials and supplies, making Wyandotte a sub-subcontractor in relation to KEO. ETS and Wyandotte had been in an open-account agreement since 2003, and this contract also governed ETS's purchases from Wyandotte during the library renovation. The contract specified that ETS would pay Wyandotte a time-price differential of 1.5% per month (18% per annum) on invoices unpaid after 30 days. This provision represented an interest rate for purchases ETS made on credit. The contract also specified that ETS would pay 33% of any unpaid balance as an

[2] Though I concur in the majority's statement of the facts, I restate the most relevant facts here for the sake of clarity.

attorney fee if Wyandotte had to pursue collection litigation after a default.

Wyandotte submitted a quote to ETS that included the time-price differential provision. ETS accepted this quote by issuing a purchase order to Wyandotte on February 19, 2010. Wyandotte began delivering materials to ETS on March 3, 2010, and made its last delivery on September 30, 2010. Over the course of the project, ETS became increasingly behind in its payments to Wyandotte. Eventually, ETS stopped payment altogether and went out of business. Though KEO claims it paid ETS all that was owed, Wyandotte never received full payment from ETS. As required by the PWBA, Wyandotte sent notice to KEO and Westfield on November 1, 2010, claiming it was owed $150,762.33 for electrical materials furnished to ETS and the time-price differential. Wyandotte filed a claim with Westfield on January 28, 2011, to recover on the payment bond. Westfield denied the claim.

Wyandotte filed a PWBA suit against ETS, KEO, and Westfield on March 14, 2011, and moved for summary disposition. The trial court granted the motion in part, holding that the bond claim was valid and that, under its contract with ETS, Wyandotte could recover both the time-price differential and attorney fees. A bench trial was held on the issue of damages. The trial court held that Wyandotte was owed a balance of $154,343.29, a time-price differential of $76,403.44, and attorney fees of $30,000. Wyandotte requested postjudgment interest under MCL 600.6013(7), which the trial court granted. The Court of Appeals affirmed this judgment in an unpublished opinion.

II. ATTORNEY FEES

MCL 129.207 of the PWBA reads as follows:

> A claimant who has furnished *labor or material* in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of [MCL 129.203], and *who has not been paid in full therefor* before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made, may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the *sum justly due* him and have execution thereon.[3]

When contractors are not fully paid after providing labor or materials for a public project, this statute permits them to sue on the payment bond for the amount unpaid at the time the civil action is instituted. The extent of defendants' statutory liability is the "sum justly due."[4] As the majority opinion correctly states, the phrase "amount . . . unpaid"[5] implies a "previous expectation of payment of a certain sum." Because the statute gives no further direction on how to calculate the sum justly due, we examine the underlying contract to determine the parties' expectations. In this case, the open-account agreement from 2003, Wyandotte's quote for the library project, and ETS's purchase orders for the project collectively constitute the basis for determining Wyandotte's contractual expectations.[6] I concur with the majority's analysis of the time-price differential and attorney fee issues up to

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[3] Emphasis added.

[4] MCL 129.207.

[5] *Id*.

[6] Because each instrument was related to the same subject matter (i.e., Wyandotte's provision of materials to ETS), we read these instruments together, as required under *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983), citing *Reber v Pearson*, 155 Mich 593; 119 NW 897 (1909). Furthermore, the PWBA allows sub-subcontractors, like

this point and with the majority's conclusion that the trial court properly awarded Wyandotte the time-price differential.

I dissent from the majority opinion as to its further analysis of, and conclusion regarding, the attorney fee provision. The majority holds that, merely because the attorney fee provision was part of the open-account agreement with ETS, the trial court appropriately included the attorney fee in its judgment. This approach treats the PWBA as if it creates a statutory breach of contract claim. I respectfully disagree. The statute only makes compensable the unpaid costs of *labor or materials furnished*. Thus, the statute limits a claimant's recovery to the contractual terms that are related to the price of labor or materials furnished. While both the time-price differential and the attorney fee provision are listed in Wyandotte's agreement with ETS, only the former actually relates to the cost of *furnishing* the materials, so the trial court should not have awarded Wyandotte an attorney fee.

I would hold that MCL 129.207 requires us to consider whether a provision of an underlying contract used to determine the expectancy of the unpaid contractor is integrally related to the cost of labor or materials furnished for the project. MCL 129.207 allows a claimant to sue on the payment bond for the amount unpaid and recover the sum justly due him. The statute defines the amount unpaid in terms of the cost of *labor and materials* provided on the project, stating that "[a] claimant who has furnished labor or material . . . and who has not been paid in full therefor . . . may sue on the payment bond for the amount,

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Wyandotte, to rely on agreements that govern a continuing contractual relationship with a subcontractor, like ETS.

or the balance thereof, unpaid . . . ."[7] In other words, the PWBA entitles a claimant to full payment for the labor or materials furnished; a claimant is not entitled to full damages that might otherwise be available for a breach of contract claim. Therefore, we should hold the principal contractor and surety liable for only those terms that are integrally related to the cost of labor or materials supplied, not for any and all collateral terms in the underlying contract. The majority erred by limiting its review simply to whether Wyandotte's claimed damages were allowed by the contract.

Furthermore, the PWBA limits the claimant's recovery based on when certain price terms are triggered. MCL 129.207 states:

> A claimant who has furnished labor or material in the prosecution of the work . . . and who has not been paid in full therefor *before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him* **for which claim is made**, may sue on the payment bond for the amount, or the balance thereof, *unpaid at the time of institution of the civil action*, prosecute such action to final judgment for the sum justly due him and have execution thereon. A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless . . . he has given *written notice* to the principal contractor and the governmental unit involved *within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material* **for which the claim is made**, stating with substantial accuracy ***the amount claimed*** and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.[8]

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[7] MCL 129.207.

[8] *Id*. (emphasis added).

MCL 129.207 repeatedly refers to a 90-day period after supplying the last of the labor or material for which the claim is made. Based on this language, Wyandotte's "claim is made" for labor or materials furnished for which Wyandotte "has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the . . . material was furnished or supplied . . . ."[9] In other words, we must examine the price terms in the contract that came due by that 90-day deadline but were not paid in full, for which the claimant may then proceed against the payment bond.

Under this interpretation, Wyandotte's claim is for the cost of materials furnished, limited to the price terms under the contract that came due by the 90-day deadline. Notably, the statute required Wyandotte to notify KEO and Westfield of its claim, "stating with substantial accuracy the amount claimed . . . ."[10] Wyandotte is then entitled to sue "for the amount, or the balance thereof, unpaid at the time of institution of the civil action . . . ."[11] When a claimant receives partial payment between its 90-day notice and the institution of its action under the PWBA, the amount unpaid will be less than the amount originally claimed in the notice. In the present case, Wyandotte was paid nothing between its 90-day notice and the time it filed its PWBA suit, so the amount unpaid is the entire amount owed, based on the price terms in its contract with ETS that triggered by the 90-day deadline.[12]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] The majority misconstrues my argument, stating, "He argues that MCL 129.207 limits a claimant's potential recovery to the amount unpaid 90 days after supplying the last of the labor or materials in

The majority claims that the plain language of the statute does not support this interpretation. However, the majority only cites a portion of the statute for this contention rather than reading the provision as a whole. The majority fails to analyze the full portion of MCL 129.207 quoted in this opinion, namely that "[a] claimant who has furnished labor or material . . . and who has not been paid in full therefor . . . may sue on the payment bond for the amount, or the balance thereof, unpaid . . . ." Thus, the statute plainly states that the claimant may only sue for the amount unpaid for labor and materials the claimant supplied, thereby limiting the claimant's recovery to the cost of labor and materials supplied. The majority opinion is internally inconsistent because, although the majority acknowledges that Wyandotte's claim against defendants is not a contract claim and does not arise directly out of the contract, the majority uses the entirety of the contract as a measure of Wyandotte's damages. Instead, the PWBA instructs us to use the contract only to establish Wyandotte's expectancy regarding the cost of labor or materials Wyandotte furnished but was not paid for.[13]

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question." The 90-day deadline does not cap the amount of damages that a claimant may recover. Instead, the deadline merely determines which price terms have triggered and, therefore, which categories of damages may be included in the claimant's recovery. For example, when a time-price differential or similar provision is applicable, the amount unpaid may increase between the time the claimant gives its 90-day notice and the time the civil action is instituted, as in the present case.

[13] I am not persuaded by the majority's argument, citing *United States ex rel Maddux Supply Co v St Paul Fire & Marine Ins*, 86 F3d 332 (CA 4, 1996), that certain federal circuit courts have interpreted the Miller Act, 40 USC 3131 *et seq*., to allow recovery of attorney fees. In *Maddux Supply Co*, the Fourth Circuit specifically noted that allowing recovery of attorney fees was consistent with its prior rulings "that contractors and their sureties are obligated to pay amounts owed by their subcontractors to suppliers." *Id*. at 336. The PWBA does not require a general contractor or its surety to pay the amount owed by a subcontractor to a sub-subcontractor. Instead, as I have explained, the PWBA explicitly

The time-price differential is inextricably related to the cost of materials furnished for the library project and the provision triggered before Wyandotte gave its 90-day notice: it is a part of the price term of the agreement with ETS and the provision applied to invoices that went unpaid after 30 days. In Wyandotte's contract with ETS, the time-price differential provision states, "Time price differential charges of 1½% per month (18% per annum) are calculated on all invoices that are not paid and past due 30 days or more." This provision created an interest rate for purchases ETS made on credit, which compensated Wyandotte for delayed payment. Wyandotte included this amount in the quote it submitted to ETS as a cost of materials. The Court of Appeals adequately explained in *Price Bros Co v Charles J Rogers Constr Co* why such a cost differential is closely related to the expectancy that is properly considered as the sum justly due under the PWBA:

> [T]he differential is an *integral part* of the cost of the transaction. If the buyer pays cash, the seller receives the money immediately and no burden is placed on him. If the buyer elects to purchase on credit, the seller is burdened by the interruption to its cash flow, and so the buyer may pay a "price" for the benefit of receiving the materials without paying for them immediately.[14]

Accordingly, the time-price differential is an integral part of the sum justly due for materials Wyandotte supplied on the renovation project because it establishes an interest rate that directly relates to the price of the materials Wyandotte furnished when ETS paid on credit.

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limits recovery to the amount unpaid for labor or materials furnished. See MCL 129.207.

[14] *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369, 377; 304 NW2d 584 (1981) (emphasis added).

In contrast, the attorney fee is not closely associated with the cost of materials furnished for the library project. The attorney fee provision in the contract states, "In the event your account is placed in the hands of an attorney for collection after default, the customer agrees to pay 33% of the unpaid balance for attorney's fees together with applicable costs." The language of this provision indicates that attorney fees are unrelated to the cost of materials because, unlike the time-price differential, they bear no relation to the cost of supplying labor or materials. The attorney fee provision creates a penalty for collection efforts rather than determining Wyandotte's expectancy—i.e., the price ETS owed for materials Wyandotte supplied. Indeed, it does not appear to be an attorney fee provision at all, because it does not define itself in terms of actual or reasonable attorney fees. It is, in fact, a liquidated damages clause that plaintiff could invoke if it placed an overdue debt into the hands of a collecting attorney.[15] Because this provision describes a liquidated collection cost rather

[15] See *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998) ("A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach."). In this agreement, if ETS breaches by defaulting on its payments and Wyandotte must litigate to recover the amount owed, the attorney fee provision fixes Wyandotte's damages: Wyandotte may recover the unpaid balance plus an additional 33% of that unpaid balance. In regard to attorney fee provisions and liquidated damages clauses, *Williston on Contracts* states:

> It is a common provision in promissory notes, and an occasional stipulation in other kinds of contracts, especially mortgages, that in case of breach, the promisor will pay an attorney's fee, the percentage or amount of which is sometimes stated, for enforcing the obligation. There seems no occasion to distinguish between mortgages and other contracts with reference to such a provision, *which is clearly in the nature of a liquidated damages provision*.

* * *

than a cost of the labor or materials themselves, it is not part of the sum justly due.

Furthermore, the attorney fee provision did not trigger by the 90-day deadline. In its 90-day notice to KEO and Westfield, dated November 1, 2010, Wyandotte claimed that the amount owed included the cost of materials furnished to ETS and the time-price differential. Wyandotte did not claim that it was owed an attorney fee because the provision had not yet triggered—Wyandotte did not sue ETS, KEO, and Westfield until March 14, 2011, which was well after the 90-day period that began to run on September 30, 2010. Thus, Wyandotte's "amount claimed"[16] does not include an attorney fee because not only is the attorney fee provision not a price term related to the cost of materials Wyandotte furnished, as already explained in this opinion, but the provision also did not trigger by the 90-day deadline.

Therefore, while I agree with the majority that the time-price differential was properly included in Wyandotte's award, I would hold that Wyandotte is not entitled to the attorney fee award because it is not directly related to the cost of materials it supplied. The attorney fee provision also triggered after the 90-day deadline created by the statute.

III. POSTJUDGMENT INTEREST

There are two relevant statutes on postjudgment interest in this case. Defendants argue that postjudg-

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> The contract sometimes makes no provision concerning the amount of the stipulated fee; sometimes it fixes a sum, either by *stating a percentage of the principal debt* or by stating a lump sum. [24 Williston, Contracts (4th ed), § 65:23, pp 319-324 (emphasis added; citations omitted).]

[16] MCL 129.207.

ment interest should have been calculated under the default formula given in MCL 600.6013(8).[17] Instead, the trial court awarded Wyandotte postjudgment interest under MCL 600.6013(7), which states:

> For a complaint filed on or after July 1, 2002, *if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate*, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually. [18]

MCL 600.6013(7) only applies when the judgment is rendered on a *written* instrument. According to the majority, this means MCL 600.6013(7) only applies if the written instrument is the actual basis of the judgment. However, I believe that the majority mistakenly concludes that the judgment was rendered on the PWBA rather than on a written instrument. As noted in the majority opinion and earlier in this opinion, although the PWBA creates Wyandotte's cause of action, the trial court must examine the underlying agreement between Wyandotte and ETS to determine

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[17] MCL 600.6013(8) states:

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.

[18] Emphasis added.

what sum is justly due. The agreement here is as much the basis for the trial court's judgment as the statute itself, so the judgment is rendered on a written instrument. Therefore, I believe it is most accurate to say the trial court's judgment is rendered *pursuant to* the statute, but it is *rendered on* the underlying contract.

But there is an even more compelling reason to reject MCL 600.6013(7) as the basis for determining postjudgment interest. MCL 600.6013(7) does not apply because the underlying contract does not evidence indebtedness. MCL 600.6013(7) only applies "if a judgment is rendered on a written instrument *evidencing indebtedness* with a specified interest rate . . . ."[19] In this case, the agreement between Wyandotte and ETS did not evidence indebtedness for the simple reason that ETS did not owe plaintiff anything on the construction project at the time they entered into the agreement. Rather, the agreement merely provided structure for calculating a potential *future* debt. The plain language of MCL 600.6013(7) requires that the written instrument provide evidence of an *existing* debt, not evidence of a *potential* debt. "Evidence of indebtedness" is a term of art.[20] Indeed, when our statutes use the phrase "evidence of indebtedness," they do so in contemplation of debt-bearing contracts or notes.[21] I therefore concur with the majority that the

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[19] Emphasis added.

[20] See MCL 8.3a ("[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

[21] See Const 1963, art 9, § 31 ("The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness . . . ."); MCL 12.272(d) (" 'Bond' means a bond, note, financial instrument, or other evidence of indebtedness or obligation issued by the authority under this act."); MCL

general interest rate under MCL 600.6013(8) applies, but I do so because the underlying contract does not provide evidence of indebtedness as required by MCL 600.6013(7).

IV. CONCLUSION

I do not believe Wyandotte is entitled to attorney fees. The so-called attorney fees specified in Wyandotte's agreement with ETS are not related to the price of the materials Wyandotte furnished nor did the provision trigger by the statute's 90-day deadline. Therefore, I would hold that attorney fees are not recoverable as a sum justly due and reverse the Court of Appeals on this issue. Furthermore, I do not agree with the majority's reasoning regarding the award of postjudgment interest. Nevertheless, I concur with the majority's conclusion that postjudgment interest should have been calculated under MCL 600.6013(8) rather than MCL 600.6013(7).

ZAHRA, J. (*concurring in part and dissenting in part*). This case primarily addresses a single statute, MCL 129.207, under the public works bond act (PWBA).[1] I

41.284 ("In lieu of borrowing money and issuing bonds or other evidence of indebtedness . . . ."); MCL 120.15 ("[T]he commission is authorized and empowered to issue notes, bonds or other evidences of indebtedness which shall be a lien upon the property to be acquired . . . ."); MCL 207.634 ("Bonds, obligations, or other evidences of indebtedness of the local governmental unit . . . ."); MCL 324.50102(3) (" 'Bond' means a bond, note, or any other instrument issued to evidence indebtedness."); MCL 388.981b(1) ("The state administrative board may authorize and approve an interest rate exchange or swap, hedge, or similar agreement or agreements in connection with the issuance of bonds, notes, or commercial paper issued under this act or in connection with outstanding bonds, notes, or commercial paper, or other obligations or evidence of indebtedness of this state under this act.").

[1] MCL 129.201 *et seq*.

agree with my colleagues that this statute does not require a claimant to provide actual notice of his or her claim to the principal contractor. A claimant need only provide notice "by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor . . . ."[2] Wyandotte Electric Supply Company satisfied the statutory requirements of notice in this case. I therefore agree with Part II of the majority opinion. I write separately because I disagree with the majority's conclusion that Wyandotte may claim attorney fees and a time-price differential under the payment bond. And while I agree that MCL 600.6013(8) should govern the calculation of postjudgment interest in this case, I disagree with my colleagues' reasoning for rejecting the use of MCL 600.6013(7).

I. ATTORNEY FEES AND THE TIME-PRICE DIFFERENTIAL

My disagreement with the majority arises under the first sentence of MCL 129.207, which states:

> A claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of section 3, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made, may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon.[3]

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[2] MCL 129.207.

[3] Under MCL 129.206, the term "claimant" means "a person having furnished labor, material, or both, used or reasonably required for use in the performance of the contract." For purposes of this opinion, a

The majority views the "sum justly due" under this statute as "the amount provided for in the claimant's contract, regardless of whether the principal contractor and its surety have agreed to that contract's terms."[4] The majority adopts this view not based on the language of the statute, but rather on "the absence of any further direction from the Legislature regarding how the amount unpaid ought to be determined . . . ."[5] The majority then compensates for this supposed legislative shortcoming by imposing its own view that "the most logical recourse is to the claimant's underlying contract, which best illustrates the intent and expectations of the parties to the contract."[6]

The majority's analysis rests on a false premise. The principal contractor, KEO & Associates, Inc., was not a *party* to the claimant's underlying contract. The contract between subcontractor Electrical Technology Systems, Inc. (ETS) and remote subcontractor Wyandotte can only illustrate the intent and expectations of ETS and Wyandotte. Indeed, KEO did not contractually agree to pay any of its subcontractors, including ETS, a time-price differential or attorney fees, and there is no basis from which to conclude that KEO would have agreed to pay a time-price differential or attorney fees to a party with whom it had no contractual relationship.

There is no dispute among my colleagues that MCL 129.207 provides a remote subcontractor with a right of action on the payment bond even though it lacks a

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claimant who lacks a direct contractual relationship with the principal contractor, such as plaintiff Wyandotte, is referred to as a "remote subcontractor" while a claimant who has a direct contractual relationship with the principal contractor is referred to as a "subcontractor."

[4] *Ante* at 147.

[5] *Ante* at 147.

[6] *Ante* at 147.

direct contractual relationship with the principal contractor. However, simply because a remote subcontractor may sue on the payment bond under MCL 129.207 does not suggest that its claim is determined by a contract to which the principal contractor who furnished the payment bond was not a party. The only contract mentioned by the Legislature in MCL 129.207 is the "contract in respect of which payment bond is furnished," which necessarily cannot include a remote subcontractor. Under Michigan law, a remote contractor's claim arises solely under the PWBA, which alone forms the basis to assess its claim.

Further, MCL 129.207 does not suggest that the principal contractor must wholly indemnify claimants under the PWBA. Rather, MCL 129.207 refers to the extent of a principal contractor's liability under the payment bond by identifying the claimant's "labor or material in the prosecution of the work" for which the claimant "has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made . . . ." This provision identifies the labor and materials that form the basis of the "amount, or the balance thereof, unpaid at the time of institution of the civil action" that the claimant may bring such action for "the sum justly due him . . . ." While a subcontractor has an actual contract with the principal contractor to determine the labor and materials it may seek to recoup under the payment bond, a remote contractor does not have a direct contractual relationship with the principal contractor. For this reason, MCL 129.207 provides, in regard to remote subcontractors, that the claimant must provide notice "within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which

the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." This notice, as in this case, identifies the labor and materials that the remote contractor has supplied. The "sum justly due" thus includes the labor and materials previously identified in the 90-day notice that the claimant has supplied but for which the claimant has not been paid. The only other statutory basis to impose liability on the payment bond is MCL 129.206, which provides that " '[l]abor and material' includes that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract." That the Legislature expressly provided for recovery of these incidental expenses, and these incidental expenses alone, strongly suggests that incidental expenses not expressly identified are not recoverable as "labor and material."[7]

To the extent that attorney fees and a time-price differential may even be considered incidental damages, as opposed to remote damages, they are simply not recoverable. Further, and perhaps more telling, is that even expenses expressly identified cannot be recovered unless they are "directly applicable to the contract."[8] Again, the only contract mentioned in MCL 129.207 is the "contract in respect of which payment bond is furnished . . . ." No real argument can be made

[7] Under the doctrine of *expressio unius est exclusio alterius*, the express mention in a statute of one thing implies the exclusion of other similar things. *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999). As applied to statutory interpretation, the doctrine reflects, "among other things, a legislative intent not to create liability outside the extent to which the legislature has acted." 22 Mich Civ Jurisprudence, Statutes, § 194.

[8] MCL 129.206.

that attorney fees are directly related to the contract in respect of which payment bond is furnished.[9] And while a colorable argument can be made that a time-price differential is directly applicable to the contract, a time-price differential is not identified by the Legislature as "[l]abor and material" costs that may be recovered.[10]

Further, MCL 129.203 provides:

> The payment bond shall be in an amount fixed by the governmental unit but not less than 25% of the contract amount solely for the protection of claimants, as defined in [MCL 129.206], supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in the contract.

The principal contractor's liability to remote contractors under the PWBA is solely based on the payment bond. The amount of the payment bond is fixed by the governmental unit at no less than 25% of the contract. If a claimant successfully sues on the pay-

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[9] On this point, I am in agreement with Chief Justice YOUNG's partial concurrence and dissent. As he states, *ante* at 163-164:

> The language of [the attorney fee provision] indicates that attorney fees are unrelated to the cost of materials because, unlike the time-price differential, they bear no relation to the cost of supplying labor or materials. The attorney fee provision creates a penalty for collection efforts rather than determining Wyandotte's expectancy—i.e., the price ETS owed for materials Wyandotte supplied. Indeed, it does not appear to be an attorney fee provision at all, because it does not define itself in terms of actual or reasonable attorney fees. It is, in fact, a liquidated damages clause that plaintiff could invoke if it placed an overdue debt into the hands of a collecting attorney. Because this provision describes a liquidated collection cost rather than a cost of the labor or materials themselves, it is not part of the sum justly due.

[10] See MCL 129.206.

ment bond and exhausts the payment bond, which may represent as little as 25% of the contract, a remote contractor that later sues no longer has legal recourse to recover against the bond furnished by the principal contractor. Remote subcontractors only have a right to sue the principal contractor on the bond because the PWBA permits a suit despite the absence of a direct contractual relationship. Significantly, any awards received under the PWBA cannot cumulatively exceed the amount of the payment bond.

This limitation of the principal contractor's liability to remote subcontractors is precisely the reason that the PWBA does not provide for remote subcontractors to seek to enforce any and all collateral terms in the underlying contract. If a single claimant or several claimants exhaust the payment bond through an award of a time-price differential and attorney fees, another remote contractor may not be able to recoup the actual labor and materials it supplied for the public project. By green-lighting the recovery of remote damages found in the underlying contracts between subcontractors and remote subcontractors, the majority arbitrarily countenances the shortchanging of other remote contractors. In my view, this effectively thwarts the Legislature's intent that the payment bond be used "solely for the protection of claimants . . . ." MCL 129.203. The majority has clearly departed from the statutory language by imposing liability for the amount provided for in the claimant's contract, regardless of whether the principal contractor and its surety have agreed to that contract's terms.

II. POSTJUDGMENT INTEREST

The trial court awarded Wyandotte postjudgment

interest under MCL 600.6013(7)[11] at the time-price differential rate specified in the contract between Wyandotte and ETS. Because I disagree that Wyandotte is entitled to a time-price differential under the PWBA, I would reverse the trial court's award of postjudgment interest on that basis alone. The majority concluded MCL 600.6013(7) does not apply here because the judgment was not rendered on a written instrument. Accordingly, the majority concluded that postjudgment interest must be calculated under the general statute for determining interest on a money judgment in a civil case, MCL 600.6013(8). I agree with the majority that MCL 600.6013(8) should govern the calculation of postjudgment interest, but I disagree with the majority that "[t]he judgment here was not rendered on a written instrument."[12]

The majority holds that judgment was rendered on Wyandotte's statutory claim rather than on the contract itself. This holding misses the entire point of the PWBA. MCL 129.207 expressly provides that a claimant "may sue *on the payment bond* . . . ."[13]

The payment bond provides that KEO and Westfield Insurance Company

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[11] MCL 600.6013(7) provides:

> For a complaint filed on or after July 1, 2002, *if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate*, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually. [Emphasis added.]

[12] *Ante* at 153.

[13] Emphasis added.

> are held and firmly bound unto Detroit Public Library . . . as Obligee . . . for the use and benefit of claimants . . . in the amount of . . . $1,302,040.00 . . . for the payment whereof [KEO] and [Westfield] bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The payment bond expressly incorporates the contract between KEO and the library, and then provides:

> THE CONDITION OF THIS OBLIGATION is such that if [KEO] shall promptly make payment to all claimants, as defined in [the PWBA], who have complied with all the provisions of the [PWBA], for labor and materials used in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect.

The payment bond is clearly an "instrument" in that it is a "written legal document that defines rights, duties, entitlements, or liabilities . . . ."[14] But regardless of whether a payment bond that secures future payment may be considered a written instrument "evidencing indebtedness," neither the payment bond nor the contract incorporated by the payment bond contain "a specified interest rate."[15] Therefore, while I disagree with my colleagues' reasoning on this issue,[16] I nonetheless agree with the result reached that interest on the judgment should be calculated based on MCL 600.6013(8).

III. CONCLUSION

I agree with the majority that a claimant need not provide actual notice to the principal contractor under

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[14] *Black's Law Dictionary* (10th ed).

[15] MCL 600.6013(7).

[16] I also disagree with Chief Justice YOUNG that the agreement between Wyandotte and ETS was as much the basis for the trial court's judgment as the statute itself.

the PWBA. I disagree with the majority however that the PWBA entitles a claimant to the amount provided for in the claimant's contract, regardless of whether the principal contractor and its surety have agreed to that contract's terms. Rather, a claimant's recovery is limited to labor and materials under the PWBA and does not include incidental expenses not provided for by the PWBA, such as time-price differentials and attorney fees. Finally, I agree with the majority's conclusion that interest on the judgment should be calculated based on MCL 600.6013(8). Under the PWBA, judgment is rendered on the payment bond, which is a written instrument evidencing indebtedness. But because this bond contained no specified interest rate, MCL 600.6013(7) does not apply.

ASSOCIATED BUILDERS AND CONTRACTORS v
CITY OF LANSING

Docket No. 149622. Argued October 15, 2015 (Calendar No. 8). Decided May 17, 2016.

Associated Builders and Contractors brought an action in the Ingham Circuit Court against the city of Lansing, alleging that the city exceeded its authority by enacting an ordinance that established a prevailing wage for contracts, agreements, or other arrangements for construction on behalf of the city. The court, Clinton Canady III, J., granted plaintiff's motion for summary disposition on the basis of *Attorney General ex rel Lennane v Detroit*, 225 Mich 631 (1923), which held that, under Michigan's 1908 Constitution, the setting of wage rates was a matter of state concern into which a city could not intrude. The Court of Appeals, BECKERING and SHAPIRO, JJ. (SAWYER, P.J., dissenting), reversed and remanded, stating that changes in the legal landscape had rendered *Lennane* obsolete and inapplicable. 305 Mich App 395 (2014). The Supreme Court granted defendant's application for leave to appeal. 497 Mich 920 (2014).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, the Supreme Court *held*:

The Court of Appeals correctly concluded that the city of Lansing had the authority under Const 1963, art 7, § 22 to enact an ordinance that established a prevailing wage. *Lennane* both applied to this factual circumstance and had not yet been overruled. Although *Lennane* was, in fact, incongruent with Michigan law as reflected in the current Constitution, the Court of Appeals had no authority to disregard *Lennane*. The Court of Appeals therefore erred by disregarding and refusing to apply *Lennane*. Because of this error, the Court of Appeals' decision was vacated, but the result was affirmed.

1. *Lennane* was decided under the 1908 Constitution, a provision of which stated that the electors of each city and village had the power to frame, adopt, and amend its charter and to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of the

state. Interpreting this provision, the *Lennane* Court held that the regulation of wages paid to third-party employees working on municipal construction contracts was exclusively a matter of state, not municipal, concern. In concluding that a municipality's powers did not include the power to enact such laws, the *Lennane* Court appears to have concluded that municipalities have only the powers relating to local concerns that were not expressly denied and could wield only those powers expressly and explicitly granted. This conclusion found no support in the 1963 Constitution. Article 7, § 22 of the 1963 Constitution provides that the electors of each city and village have the power and authority to frame, adopt, and amend its charter and to amend an existing charter of the city or village heretofore granted or enacted by the Legislature for the government of the city or village. It further provides that each city and village has the power to adopt resolutions and ordinances relating to its municipal concerns, property, and government, subject to the Constitution and law, and that no enumeration of powers granted to cities and villages in the Constitution shall limit or restrict the general grant of authority conferred by Article 7, § 22. The 1963 Constitution also contained a new provision, Article 7, § 34, which stated that the provisions of the Constitution and law concerning counties, townships, cities, and villages must be construed liberally in their favor and that the powers granted to counties and townships by the Constitution and by law included those fairly implied and not prohibited by the Constitution. The wages paid to employees of contractors working on municipal contracts had a self-evident relationship to municipal concerns, property, and government. Furthermore, the plain language of the 1963 Constitution grants cities and villages broad powers over municipal concerns, property, and government whether those powers are enumerated or not, and the relevant constitutional language does not state that a matter cannot be a municipal concern if the state might also have an interest in it. Thus, if *Lennane*'s holding was ever on firm constitutional ground, it no longer had sound footing after the people ratified the 1963 Constitution, and no reliance interests cautioned against overruling *Lennane*. Accordingly, the rule in *Lennane* that city and village governments may not enact ordinances or charter provisions governing the wages paid to third-party employees working on municipal construction contracts was overruled.

2. The Court of Appeals erred by failing to follow *Lennane*. While developments over the past century undercut the foundation on which *Lennane* stood, its holding was never explicitly

superseded by the ratifiers of the 1963 Constitution or by the Legislature, nor was it overruled by the Supreme Court. The Court of Appeals was bound to follow decisions of the Supreme Court except when those decisions have clearly been overruled or superseded, and it was not authorized to anticipatorily ignore a Supreme Court decision if it determined that the foundations of the decision had been undermined. While the Court of Appeals decision reached the correct result, it erred by usurping the Supreme Court's role under the Constitution.

Court of Appeals judgment vacated; result affirmed; case remanded to the Ingham Circuit Court for further proceedings.

Justice ZAHRA, concurring in the result, agreed that the prevailing-wage ordinance was a valid exercise of the city's authority under Const 1963, art 7, § 22, and also agreed that the outcome in *Lennane* should be overruled. He wrote separately to address the powers granted to municipalities by the 1963 Constitution, stating that municipalities may only act pursuant to express grants of power and that the courts were constitutionally mandated to construe that express power liberally.

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — PREVAILING-WAGE ORDINANCES.

A municipal corporation has the power under Const 1963, art 7, § 22 to adopt resolutions and ordinances relating to its municipal concerns, property, and government, subject to the Constitution and law; a municipality has the authority to enact an ordinance that establishes a prevailing wage under this provision.

Masud Labor Law Group (by *Kraig M. Schutter*) for plaintiff.

Plunkett Cooney (by *Michael S. Bogren*) for defendant.

Amici Curiae:

Lipson, Neilson, Cole, Seltzer & Garin, PC (by *C. Thomas Ludden* and *Samantha K. Heraud*), for the National Federation of Independent Business Small Business Legal Center.

Miller, Canfield, Paddock & Stone, PLC (by *Clifford W. Taylor*, *Paul D. Hudson*, and *James D. Boufides*), for the Michigan Municipal League.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, PC (by *Robert E. Thall*), for the Michigan Townships Association.

McKnight, McClow, Canzano, Smith & Radtke, PC (by *John R. Canzano*), for the Michigan Building and Construction Trades Council.

Sachs Waldman, PC (by *Andrew Nickelhoff*), for the Michigan State AFL-CIO.

YOUNG, C.J. Plaintiff appeals by leave the Court of Appeals' opinion in *Associated Builders & Contractors v City of Lansing*.[1] Plaintiff claims that the city of Lansing's Ordinance 206.18(a) is unconstitutional under this Court's 1923 decision *Attorney General ex rel Lennane v Detroit*[2] and is an unlawful usurpation of state power. The Court of Appeals majority disagreed and ruled that subsequent changes to state law had caused *Lennane* to be "superseded." The Court of Appeals erred by exceeding its powers for refusing to follow a decision from this Court that both applied and had not been overruled. Even so, we now take this opportunity to overrule *Lennane* because subsequent constitutional changes[3] have undercut its viability. We therefore vacate the Court of Appeals' decision but affirm the result for the reasons stated below.

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[1] *Associated Builders & Contractors v City of Lansing*, 305 Mich App 395; 853 NW2d 433 (2014).

[2] *Attorney General ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923).

[3] See Const 1963, art 7, §§ 22 and 34.

FACTS AND PROCEDURAL HISTORY

Defendant, city of Lansing, enacted an ordinance requiring contractors working on city construction contracts to pay employees a prevailing wage. The ordinance states in relevant part:

> No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of the work, shall be approved and executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.[4]

Plaintiff, a trade association, filed suit against Lansing, arguing that the ordinance is unconstitutional because municipalities do not have the authority to adopt laws regulating the wages paid by third parties, even where the relevant work is done on municipal contracts paid for with municipal funds. Plaintiff relies primarily on this Court's 1923 *Lennane* decision, which held that, under this state's 1908 Constitution, the city of Detroit could not enact an essentially analogous ordinance and related city charter provision.[5] In response, defendant argued that the legal landscape, particularly the ratification of a new constitution in 1963, had changed so radically that *Lennane* was no longer relevant in determining the question at hand. The trial court granted summary disposition to plaintiff, ruling that *Lennane* made it clear that the regu-

[4] Lansing Ordinances, § 206.18a.

[5] *Lennane*, 225 Mich at 641.

lation of wages was a matter of state, not municipal, concern under the Michigan Constitution[6] and the Home Rule Act,[7] though it did take note of *Lennane*'s "archaic nature."

The Court of Appeals panel reversed the lower court in a published, split decision.[8] Although the panel majority stated that its opinion "neither overrule[s] *Lennane* nor deviate[s] from the rule of stare decisis,"[9] the majority nevertheless ruled that changes in the legal landscape had, in fact, rendered *Lennane* obsolete and inapplicable. The panel stated that "the founda-

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[6] Most relevant to our analysis, Article 7, § 22 of the 1963 Constitution provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

[7] MCL 117.4j. We decide this case under the Michigan Constitution, but the similar text of the Home Rule Act informs our decision. In relevant part, the Act states:

> Each city may in its charter provide:
>
> * * *
>
> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

[8] *Associated Builders*, 305 Mich App at 398.

[9] *Id*. at 411.

tion upon which *Lennane* stood has been rejected by our Supreme Court."[10] One judge dissented, arguing that the majority was unlawfully striking down a decision by this Court because *Lennane* had never been overruled—either implicitly or explicitly—or rendered inapplicable. The dissenting opinion stated:

> [T]he Court's conclusion in *Lennane* that this is a matter of state concern has never been overruled. Therefore . . . defendant's powers . . . do not extend to this ordinance until and unless the Supreme Court revisits its conclusion in *Lennane*, or the Legislature explicitly grants cities the power to adopt prevailing wage ordinances.[11]

This appeal followed.

STANDARD OF REVIEW

This Court reviews de novo both questions of constitutional law and a trial court's decision on a motion for summary disposition.[12]

ANALYSIS

We take this opportunity to overrule *Lennane*. *Lennane*'s conception of municipal power may or may not have been well-grounded in Michigan's 1908 Constitution and the legal landscape of the time, but it is certainly incongruent with the state of our law as reflected in our current Constitution. We therefore conclude that *Lennane* has no continuing viability in light of the adoption of our 1963 Constitution.

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[10] *Id*. It is because the panel below failed to give deference to the precedential authority of our opinions that we vacate the opinion of the Court of Appeals.

[11] *Id*. at 421 (SAWYER, P.J., dissenting).

[12] *Dep't of Transp v Tompkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

The 1908 Constitution read in relevant part:

> Under such general laws, the electors of each city and village shall have power to frame, adopt, and amend its charter, . . . and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.[13]

Interpreting this constitutional provision, the *Lennane* Court held that the regulation of wages paid to third-party employees working on municipal construction contracts was exclusively a matter of "state," not "municipal," concern.[14] Quoting liberally from a 1919 case, *Kalamazoo v Titus*,[15] the *Lennane* Court stated:

> "The charter provision, the ordinance, the argument made for the city, indeed, the suit itself, reflect a popular interest in, and, we conceive, a popular misunderstanding about, the subject of home rule, so-called, in cities. There is apparent a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and the purpose to exercise them. Whether these powers are really inherent in the community, but their exercise formerly was restrained, or are derived from a new grant of power by the State, or may be properly ascribed to both inherent right and to a new grant, are questions which do not seem to bother very much the advocates of the doctrine that they in any event exist. *On the other hand, there is expression of grave doubt whether, in the view of the law, there has been any*

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[13] Const 1908, art 8, § 21.

[14] *Lennane*, 225 Mich at 638 ("The police power rests in the State. . . . While the municipality in the performance of certain of its functions acts as agent of the State it may not as such agent fix for the State its public policy. That power has not been delegated to these agents of the State. Unless delegated in some effective way the police power remains in the State.").

[15] *Kalamazoo v Titus*, 208 Mich 252; 175 NW 480 (1919).

> *enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution itself and in the home rule act*." [16]

By quoting *Titus* at such length, the *Lennane* Court appears to have been posing itself a question: under the 1908 Constitution, what, exactly, are the default powers of municipalities? Do municipalities have all powers relating to local concerns that are not expressly denied, or can they wield only those powers expressly and explicitly granted? In concluding that a municipality's powers did not include the power to enact laws regulating the wages paid to third-party employees working on municipal construction contracts, the *Lennane* Court appears to have chosen the latter answer.

This conclusion finds no support in the 1963 Constitution. Article 7, § 22 of the 1963 Constitution provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or *enacted* by the legislature for the government of the city or village. *Each such city and village shall have power to adopt resolutions* and ordinances relating to its municipal concerns, *property and government*, *subject to the constitution and law*. *No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section*.[17]

Explaining these highlighted changes, the Address to the People states:

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[16] *Lennane*, 225 Mich at 639, quoting *Titus*, 208 Mich at 260-261 (emphasis added; citation omitted).

[17] The new language added is italicized.

> This is a revision of Sec. 21, Article VIII, of the present [1908] constitution and reflects Michigan's successful experience with home rule. *The new language is a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law*.[18]

The 1963 Constitution also contained a new provision, Article 7, § 34:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.[19]

If it was ever the case, we conclude that, given the newly added language that expresses the people's will to give municipalities even greater latitude to conduct their business, there is simply no way to read our current constitutional provisions and reach the conclusion that "there is . . . grave doubt whether . . . there has been any enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution

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[18] 2 Official Record, Constitutional Convention 1961, p 3393 (emphasis added).

[19] Const 1963, art 7, § 34. The Address to the People for this provision explains:

> *This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments*. Home rule cities and villages already enjoy a broad construction of their powers and *it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes*. [2 Official Record, Constitutional Convention 1961, p 3395 (emphasis added).]

itself and in the home rule act."[20] Under our current Constitution, there is simply no room for doubt about the expanded scope of authority of Michigan's cities and villages: "No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."[21] Moreover, these powers over "municipal concerns, property and government" are to be "liberally construed."[22] In contrast, the *Lennane* Court briefly interpreted the more limited language in the 1908 Constitution—granting cities and villages the right to "pass all laws and ordinances relating to its municipal concerns"—decided upon a narrow conception of local authority, and declared, with scant analysis, that a prevailing wage law similar to this one was exclusively a matter of "state concern."

But the wages paid to employees of contractors working on *municipal contracts* have a self-evident relationship to "municipal concerns, property, and government" if those words are even reasonably, if not liberally, construed. Those wage rates concern how a municipality acts as a market participant, spending its own money on its own projects.[23] If a municipality has

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[20] *Lennane*, 225 Mich at 639.

[21] Const 1963, art 7, § 22.

[22] Const 1963, art 7, § 34.

[23] *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "municipal" as "of, relating to, or characteristic of a municipality," which is "a primarily urban political unit having corporate status and usu. powers of self-government." The same dictionary defines "property" as "something owned or possessed" and defines "government" as "the act or process of governing . . . authoritative direction or control." All three of these definitions are broad enough to encompass the conditions a municipality places in its municipality-funded construction contracts, including conditions as to what contractors on those projects pay their workers. These contracts clearly "relate to" the municipality in that they are public projects; they concern a municipality's own money and

broad powers over local concerns, it certainly has the power to set terms for the contracts it enters into with third parties for its own municipal projects—including provisions relating to the wages paid to third-party employees. This way, the municipality controls its own money and presumably expresses its citizens' preference as to what those who work on *public* projects should be paid. We see nothing in these municipal aims that falls outside the ambit of Article 7, § 22 of the 1963 Constitution.[24]

Furthermore, *Lennane*'s holding appears to rest on an implicit dichotomy: if something is a matter of "state concern," it cannot also be a matter of "local concern."[25] But this binary understanding does not comport with the plain language of the 1963 Constitution, which grants cities and villages broad powers over "municipal concerns, property and government" whether those powers are enumerated or not. The relevant constitutional language does not state that a matter cannot be a "municipal concern" if the state might also have an interest in it.[26] While a binary

property, things that it clearly "owns or possesses"; and a municipality certainly has "authoritative direction or control" over its own public-works projects.

[24] Nothing in this opinion should be interpreted to imply that municipalities are sovereign entities with extraconstitutional powers or the ability to negate legislative action. See Const 1963, art 7, § 22 ("Each . . . city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*.") (emphasis added).

[25] It is somewhat difficult to parse this aspect of *Lennane*'s holding, because the *Lennane* Court never explains precisely why the wages paid to third-party employees working on municipal construction contracts are matters of state concern.

[26] Indeed, in this very area of prevailing wages, the Legislature explicitly omits municipalities from its list of affected governmental "contracting agents" in the state prevailing wage statute, MCL 408.551(c). This drafting decision strongly suggests an independent

understanding of state and local governmental power might have been common 100 years ago,[27] the ratifiers of the 1963 Constitution do not appear to have worked under the same apprehension—instead, we are left with their words: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."[28]

Thus, if *Lennane*'s holding was ever on firm constitutional ground, it no longer had sound footing after the people ratified the 1963 Constitution. We agree with the Court of Appeals majority that subsequent changes in the law have undercut *Lennane*'s foundations.[29] Accordingly, we conclude that "changes in the

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local role for setting wage rates on municipal contracts. At the very least, there is no evidence that the Legislature intended to preempt municipal authority in this area.

[27] Along with *Lennane*, several older cases appear to adopt this binary conception of state and local governance. See, e.g., *People ex rel Bd of Detroit Park Commissions v Detroit Common Council*, 28 Mich 227, 240 (1873) ("Whoever insists upon the right of the State to interfere and control by cumpulsory [sic] legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons."); *Thomas v Wayne Co Bd of Supervisors*, 214 Mich 72, 84; 182 NW 417 (1921) ("[Establishing and maintaining a tract index] is purely a matter of local concern. Neither the state as a whole nor any person other than a taxpayer of Wayne county [sic] has any interest in the matter."). Since the passage of the 1963 Constitution, however, Michigan courts have not relied upon this archaic, binary conception of state and local power. See *Airlines Parking, Inc v Wayne Co*, 452 Mich 527, 539; 550 NW2d 490 (1996) ("[M]atters of local concern may also be matters of state concern."). In the face of explicit textual direction to the contrary, we decline to impose such an anachronistic conception of state and local government on our current constitution.

[28] Const 1963, art 7, § 34.

[29] The Court of Appeals panel majority stated that "the foundation upon which *Lennane* stood has been rejected by our Supreme Court." *Associated Builders*, 305 Mich App at 411. The panel majority relied on language from decisions of this Court, including *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 253-254; 566 NW2d 514

law . . . no longer justify the questioned decision."[30] Nor do we believe that any reliance interests affected by this Court's overruling *Lennane* caution against our analysis. Reliance interests, while important to the rule of stare decisis, must fall to the wayside when this Court is addressing actual changes in the text of our

(1997) ("Home rule cites have broad powers to enact ordinances for the benefit of municipal concerns under the Michigan Constitution . . . . The home rule cities act is intended to give cities a large measure of home rule. It grants general rights and powers subject to enumerated restrictions.") (citations omitted), *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994) ("[I]t is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance.") (citation omitted), and *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003), quoting *Walker*, 445 Mich at 690 ("We have held that 'home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied.' "). While all of these cases use clear language acknowledging the broad grants of municipal authority in the 1963 Constitution and the Home Rule Act, none of them relate directly to the problem at issue in this case or purport to overrule *Lennane*. These cases support the point made by the panel. However, rather than rely primarily on the gloss in some of our past cases, we take this opportunity to overrule *Lennane* anchoring our decision on the text of the 1963 Constitution itself.

[30] *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). While the "first inquiry" in considering whether to overrule a prior decision of this Court is generally whether that prior decision was wrongly decided, *Sington v Chrysler Corp*, 467 Mich 144, 162; 648 NW2d 624 (2002), in cases such as this where the legal landscape has changed dramatically, it adds little to the inquiry to determine whether the prior decision was correctly decided under obsolete law. See *Robinson*, 462 Mich at 455 (concluding that *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983), "may have been proper when decided, but it is no longer 'good law' after *Ross* [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)]"). We note, however, that *Lennane* offered precious little textual analysis for its conclusion, so to the extent that the phrase "municipal concerns" remains unchanged between the 1908 and 1963 Constitutions, *Lennane*'s analysis of that term is not particularly illuminating.

constitutions. We therefore declare that *Lennane* has no continuing viability and repudiate its conception of municipal authority in light of the ratification of the 1963 Constitution. The rule in *Lennane*—that city and village governments may not enact ordinances or charter provisions governing the wages paid to third-party employees working on municipal construction contracts—is overruled.

Nonetheless, we also agree with Court of Appeals dissent's following assessment of the binding nature of *Lennane* before the instant decision:

> [T]he Court's conclusion in *Lennane* that this is a matter of state concern has never been overruled. Therefore, even if we apply a "liberal construction" to defendant's powers, they do not extend to this ordinance until and unless the Supreme Court revisits its conclusion in *Lennane*, or the Legislature explicitly grants cities the power to adopt prevailing wage ordinances.[31]

While it is inarguable that developments over the past century have undercut the foundation upon which *Lennane* stood, its holding was never explicitly superseded by the ratifiers of the 1963 Constitution or by the Legislature, nor was it overruled by this Court. The Court of Appeals is bound to follow decisions by this Court except where those decisions have *clearly* been overruled or superseded[32] *and is not authorized to*

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[31] *Associated Builders*, 305 Mich App at 421 (SAWYER, P.J., dissenting).

[32] Although one can determine with relative ease whether a case was overruled by this Court, we acknowledge that it is not always so easy to determine whether a case has been "clearly overruled or superseded" by intervening changes in the positive law. At one end of the spectrum are situations in which the Legislature has entirely repealed or amended a statute to expressly repudiate a court decision. In such situations, lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law. The other end of the spectrum is harder to define; however, as it relates

anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined.[33] Thus, while we agree with the result of the Court of Appeals' decision, we disapprove of its usurpation of this Court's role under our Constitution.

CONCLUSION

Lennane, whatever its merits when it was decided, has been undercut by the adoption of the 1963 Constitution. We therefore overrule *Lennane*. Under our Constitution, cities and villages may enact ordinances relating to "municipal concerns, property and government," including ordinances and charter provisions regulating the wages paid to third-party employees working on municipal construction contracts, "subject to the constitution and law."[34]

The Court of Appeals erred, however, by disregarding precedent from this Court that has not been clearly overruled by the Court or superseded by subsequent legislation or constitutional amendment. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts

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to this case, because both the 1908 Constitution and the 1963 Constitution contain the phrase at issue in *Lennane*—"relating to its municipal concerns"—*Lennane* had not been clearly superseded, and the Court of Appeals was bound by it.

[33] "While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), itself overruled in part by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010).

[34] Const 1963, art 7, § 22.

are bound by that authority."[35] Because of this error, we vacate the Court of Appeals' decision but affirm the result, for the reasons stated above.

MARKMAN, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with YOUNG, C.J.

ZAHRA, J. (*concurring in the result*). I agree with the majority's ultimate conclusion that the prevailing-wage ordinance is expressly authorized by Const 1963, art 7, § 22. I write separately to address the powers granted to municipalities by the 1963 Constitution.

Municipalities have never possessed inherent authority not expressly granted by the Constitution or laws of Michigan and do not have it today. It was not until the 1908 Constitution that municipalities were granted the power of self-governance, a concept known as "home rule."

The 1908 Constitution required the Legislature to enact a general law for the incorporation of cities and villages:

> The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.[1]

Section 21 of the 1908 Constitution also provided the first "charter" provision, vesting in municipalities the power of home rule. This provision allowed municipalities to frame, adopt, and amend their charters, and states:

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[35] *Boyd*, 443 Mich at 523.

[1] Const 1908, art 8, § 20.

> Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.[2]

The Address to the People accompanying the 1908 Constitution explained the addition of constitutional provisions pertaining to home rule—a concept not found in prior constitutions—in detail:

> The provisions herein contained are designed to meet the modern conditions affecting municipal affairs; to authorize through appropriate legislation that which has heretofore been denominated "Home Rule."
>
> These provisions constitute a marked advance from the present constitutional provisions relating to cities and villages by doing away with the principle of classification and with special charters, granted and subject to amendment only by the state legislature. The purpose is to invest the legislature with power to enact into law such broad general principles relative to organization and administration as are or may be common to all cities and all villages, each city being left to frame, adopt and amend those charter provisions which have reference to their local concerns. The most prominent reasons offered for this change are that each municipality is the best judge of its local needs and the best able to provide for its local necessities; that inasmuch as special charters and their amendments are now of local origin, the state legislature will become much more efficient and its terms much shorter if the labor of passing upon the great mass of detail incident to municipal affairs is taken from that body and given into the hands of the people primarily interested.

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[2] Const 1908, art 8, § 21.

> Under these provisions, cities and villages, as under the present [1850] constitution, will remain subject to the constitution and all the general laws of the state.[3]

Thus, under the 1908 Constitution, municipalities had for the first time the power to govern their own affairs. But this constitutional change did not grant municipalities inherent authority based solely on the assertion of their existence. Instead, this was a specific but limited grant of the power of home rule that was "subject to the constitution and general laws of this state."[4] The grant of home rule expressly provides municipalities with greater control over local affairs, but it did not create any inherent authority in municipalities. The Court in *Attorney General ex rel Lennane v Detroit* recognized this when it dismissed the notion that municipalities have inherent authority. The powers are limited to those "specifically enumerated and designated in the Constitution itself and in the home rule act."[5]

The 1963 Constitution contains a similar charter provision to that found in the 1908 Constitution that specifically grants the power of home rule. The 1963 Constitution also added a provision that states, "[n]o enumeration of powers granted to cities . . . in this constitution shall limit . . . the general grant of authority conferred by [Const 1963, art 7, § 22]."[6] This language merely guides courts on how to construe this constitutional provision. Despite the express grant of authority conferred by § 22, the 1963 Constitution

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[3] Official Record, Constitutional Convention 1907-1908, pp 42-43.

[4] Const 1908, art 8, § 21.

[5] *Attorney General ex rel Lennane v Detroit*, 225 Mich 631, 639; 196 NW 391 (1923), quoting *Kalamazoo v Titus*, 208 Mich 252, 261; 175 NW 480 (1919).

[6] Const 1963, art 7, § 22.

contains other enumerated powers granted to municipalities.[7] As it plainly states, the last sentence of Article 7, § 22 makes it clear that no enumeration of power in other parts of the 1963 Constitution "shall limit . . . the general grant of authority conferred by . . . section [22]." This language does not confer a new grant of power. Instead, it is a rule of construction. Municipalities are not sovereign entities that have inherent authority; they are creations of the state that derive their power and authority from the state.[8] We reiterated this fundamental principle in *City of Taylor v Detroit Edison Co*:

> "[Local governments] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant." [9]

The 1963 Constitution provided another rule of construction not found in previous constitutions that proves helpful to the disposition of this case. Article 7, § 34 of the 1963 Constitution directs that the laws and constitutional provisions relating to the specific grant of municipal powers be liberally construed:

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[7] See, e.g., Const 1963, art 7, § 23 ("Any city or village may acquire . . . parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety."); Const 1963, art 7, § 24 ("Subject to this constitution, any city or village may acquire . . . public service facilities . . . .").

[8] See *Bivens v Grand Rapids*, 443 Mich 391, 397; 505 NW2d 239 (1993).

[9] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006), quoting *Titus*, 208 Mich at 262.

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.[10]

Applying this rule of construction to the present case, the city of Lansing's prevailing-wage ordinance survives constitutional challenge. This ordinance requires that private employers pay their employees the local prevailing wage when contracting with Lansing for municipal projects.[11] This is strikingly similar to the ordinance at issue in *Lennane*. While the *Lennane* Court concluded that the prevailing-wage ordinance before it was a state concern outside the power of a municipality to regulate, the Court offered no reasoning to support its conclusion. Significantly, *Lennane* was decided under the 1908 Constitution, which did not direct a liberal construction of home rule authority. And while we give *Lennane* deference, the 1963 Constitution directs us to interpret matters of home rule liberally. Following this direction, it is apparent that the prevailing-wage ordinance before us today is a matter of municipal concern.[12]

In sum, I agree with the majority that under the 1963 Constitution, the city of Lansing's prevailing-wage ordinance is a valid exercise of the specific grant

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[10] Const 1963, art 7, § 34.

[11] Lansing Ordinances, § 206.18(a).

[12] I also agree with the Court of Appeals' conclusion that preemption does not apply. Neither the Minimum Wage Law, MCL 408.381 *et seq*., which was repealed in 2014, nor the Michigan prevailing wage act, MCL 408.551 to MCL 408.558, prohibits municipalities from setting prevailing wage rates for municipal contracts or agreements. Additionally, no state law occupies the entire field of establishing prevailing wages. See *Associated Builders & Contractors v City of Lansing*, 305 Mich App 395, 414; 853 NW2d 433 (2014).

of authority found in Const 1963, art 7, § 22. I also agree with the majority that the outcome in *Lennane* should be overruled. Municipalities may only act pursuant to express grants of power. We are constitutionally mandated to construe that express power liberally. To this extent, I concur in the majority opinion.

PEOPLE v GLOSTER

Docket No. 151048. Argued on application for leave to appeal March 9, 2016. Decided May 24, 2016.

Antonio T. Gloster was convicted of aiding and abetting armed robbery following a jury trial in the Wayne Circuit Court. Defendant had driven four men to a market in Hamtramck, Michigan. While defendant stayed in the car, two of the men assaulted a woman and attempted to steal her necklace. Defendant then picked the men up and drove away. When scoring the sentencing guidelines, the court, Lawrence S. Talon, J., assessed 15 points for Offense Variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40, concluding that predatory conduct had been involved. Defendant appealed, arguing in part that it was improper to base his OV 10 score on his co-offenders' conduct and that points should be assessed under OV 10 only for the individual defendant's conduct. The Court of Appeals, MURRAY, P.J., and SAAD and HOEKSTRA, JJ., affirmed in an unpublished opinion per curiam, issued December 30, 2014 (Docket No. 316553), declining to address whether a sentencing court may consider the conduct of a co-offender when scoring OV 10 and concluding that the trial court's score was supported by defendant's own conduct, specifically, his role in selecting a vulnerable victim. Defendant appealed, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 498 Mich 910 (2015).

In a unanimous opinion by Justice ZAHRA, the Supreme Court *held*:

A sentencing court may not assess points for a defendant solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary. MCL 777.40(1)(a) requires the assessment of 15 points for OV 10 when predatory conduct was involved. Under MCL 777.40(3)(a), predatory conduct is preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization. The Legislature explicitly provided in several OVs that all offenders in a multiple-offender situation, including the defendant, should receive the same score, even if

the conduct that serves as the basis for scoring those OVs was solely that of a co-offender. MCL 777.40, however, does not contain language directing the court to assess a defendant points for OV 10 on the basis of conduct by that defendant's co-offenders in multiple-offender situations. Accordingly, a sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders. The trial court erred by doing so in this case, supporting its scoring of OV 10 by explaining that two of the people defendant drove to Hamtramck went to a corner in the market to watch for an appropriate victim. The court therefore considered only the conduct of defendant's co-offenders in watching for an appropriate victim when it assessed defendant 15 points for predatory conduct. The Court of Appeals likewise erred by concluding that the trial court's scoring of OV 10 was supported by defendant's own conduct. Because the trial court did not itself find that defendant's own conduct was predatory in nature, the Court of Appeals failed to review the trial court's findings for clear error.

Court of Appeals' judgment reversed in part; case remanded to the trial court for further proceedings not inconsistent with the holding.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — EXPLOITATION OF VULNERABLE VICTIMS — PREDATORY CONDUCT — CONDUCT OF CO-OFFENDERS.

When scoring the sentencing guidelines, MCL 777.1 *et seq*., a sentencing court may not assess offense variable (OV) points for a defendant solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary; with respect to OV 10 (exploitation of a vulnerable victim), MCL 777.40(1)(a) requires the sentencing court to assess 15 points for OV 10 when predatory conduct was involved, but the court may not assess a defendant 15 points for predatory conduct solely on the basis of the predatory conduct of that defendant's co-offenders.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kristin E. LaVoy*) for defendant.

ZAHRA, J. In this case, we consider whether a sentencing court may assess a defendant 15 points for "predatory conduct" under Offense Variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40, solely on the basis of the predatory conduct of a defendant's co-offenders. We conclude that it may not. In direct contrast to other OVs, MCL 777.40 contains no language directing a court to assess a defendant the same number of points as his co-offenders in multiple-offender situations. We decline to import such language into OV 10, as it is a well-established rule of statutory construction that this Court will not read words into a statute that the Legislature has excluded.[1]

The trial court assessed 15 points for OV 10 solely on the basis of the predatory conduct of defendant's co-offenders. Defendant appealed this decision, but the Court of Appeals declined to address "whether a trial court may consider the conduct of a co-offender when scoring OV 10 . . . ."[2] Instead, the Court of Appeals concluded that the trial court's scoring of OV 10 was supported by defendant's own conduct.[3] However, because the trial court did not itself find that defendant's own conduct was predatory in nature, we conclude that the Court of Appeals failed to review the trial court's findings for clear error as required by *People v Hardy*.[4] Accordingly, we reverse in part the judgment of the

[1] *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999).

[2] *People v Gloster*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket No. 316553), p 4 n 2.

[3] *Id*.

[4] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with our holding that a sentencing court may not assess a defendant 15 points for "predatory conduct" under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders. In all other respects, leave to appeal is denied.

I. FACTS AND PROCEEDINGS

This case arises from a robbery that occurred in Hamtramck on October 20, 2012. On that date, defendant drove four men, including Marvin Graham and Calvin Gloster, defendant's brother, to Hamtramck. Graham attacked the victim outside the Polish Market. According to surveillance footage, Graham and Calvin Gloster stood outside the market and watched a man walking alone, two individuals, and a group of children pass by before Graham attacked the victim, a woman who was walking alone. In an attempt to steal the woman's necklace, Graham hit her in the back of her head and knocked her to the ground. When onlookers intervened, Graham and Calvin Gloster fled, but not before Calvin Gloster shot one of the intervening onlookers with a pistol.

During the robbery, defendant was parked near the Polish Market. After Graham and Calvin Gloster fled, defendant picked the men up, which required him to circle around the block to find Graham, and drove them out of the area. After he was arrested by police and interrogated about his participation in the robbery, defendant admitted that he had acted as the getaway driver in the robbery. Specifically, he admitted driving the men to the area and that they were "trying to get some money, simple as that." He also admitted driving

the men out of the area following their failed attempt to obtain the victim's necklace.

The prosecution charged defendant as an aider and abettor to armed robbery under MCL 750.529 and unarmed robbery under MCL 750.530. After deliberation, the jury convicted defendant of aiding and abetting armed robbery.

The trial court sentenced defendant to 85 months to 20 years in prison. At sentencing, the parties disagreed about whether OV 10 should be scored at 15 points for predatory conduct. The court agreed with the prosecution that it should, ruling that the score was appropriate because, while defendant waited in the car, the other two perpetrators waited for an appropriate victim.

Defendant appealed the trial court's decision in the Court of Appeals, arguing in part that it was erroneous to base defendant's OV 10 score on his co-offenders' conduct. Instead, defendant claimed, OV 10 should be scored only for the individual defendant's conduct. He also argued that his co-offenders' conduct was not predatory in nature under existing caselaw. The Court of Appeals affirmed the trial court's scoring in an unpublished opinion per curiam, concluding that "[d]efendant aided and abetted the commission of an offense that involved the exact sort of 'predatory conduct' OV 10 is designed to punish."[5] In a footnote, the panel dismissed defendant's argument that his OV 10 score was based solely on his co-offenders' conduct. To the contrary, the panel concluded that "the record demonstrates that the trial court scored defendant for *his* conduct—specifically, his role in selecting a vulnerable victim."[6]

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[5] *Gloster*, unpub op at 3.

[6] *Id*. at 4 n 2.

Defendant sought leave to appeal in this Court. We directed the Clerk of the Court to schedule oral argument on whether to grant the application or take other action.[7] We specifically requested that the parties address

> whether the defendant was properly assigned 15 points for offense variable (OV) 10, MCL 777.40, for predatory conduct, and in particular, whether the scoring of OV 10 was proper based on the defendant's own conduct, or alternatively, based on the conduct of the defendant's accomplices. See MCL 767.39; cf. *People v Hunt*, 290 Mich App 317, 325-326 [810 NW2d 588] (2010) (conviction not based on aid and abetting), cited in *People v Hardy*, 494 Mich 430, 442 n 32 [835 NW2d 340] (2013).[8]

II. STANDARD OF REVIEW

A trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.[9] "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."[10]

III. ANALYSIS

OV 10, governed by MCL 777.40, provides in relevant part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of

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[7] MCR 7.305(H)(1).

[8] *People v Gloster*, 498 Mich 910 (2015).

[9] *Hardy*, 494 Mich at 438.

[10] *Id*.

> the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points
>
> (d) The offender did not exploit a victim's vulnerability ..... 0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

As used in this section, " 'predatory conduct' means preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization."[11]

MCL 777.40 contains no language directing a court to assess a defendant points for OV 10 on the basis of conduct by a defendant's co-offenders in multiple-offender situations. This is in direct contrast to OVs 1, 2, and 3, all of which specifically direct a court to assign a defendant the same number of points that all offenders are assessed in multiple-offender cases. OV 1 (aggravated use of a weapon) provides that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be

[11] MCL 777.40(3)(a), as amended by 2014 PA 350. At the time this case arose, MCL 777.40(3)(a) did not include the reference to "a law enforcement officer posing as a potential victim."

assessed the same number of points."[12] OV 2 (lethal potential of weapon possessed or used)[13] and OV 3 (physical injury to victim)[14] similarly mandate that "all offenders" in a multiple-offender case "shall be assessed the same number of points." Since this language clearly indicates that all offenders must have the same number of points assessed, it follows that a trial court must assess a defendant points for OVs 1, 2, and 3 when his or her co-offender had points for those OVs assessed, even if the conduct that serves as the basis for scoring those OVs was solely that of the co-offender.

"Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[15] Because the Legislature has explicitly provided that all offenders in a multiple-offender situation should receive the same score for OVs 1, 2, and 3, but excluded that language from other OVs, we conclude that a defendant shall not have points assessed solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary.[16] To conclude otherwise

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[12] MCL 777.31(2)(b).

[13] MCL 777.32(2).

[14] MCL 777.33(2)(a).

[15] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

[16] The Court of Appeals reached a similar conclusion in *People v Hunt*, 290 Mich App 317; 810 NW2d 588 (2010). That case pertained to OV 7, which at that time directed a court to assess a defendant 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a), as amended by 2002 PA 137. In *Hunt*, the trial court assessed defendant 50 points for OV 7 even though the record indicated that his codefendant alone engaged in the behavior that led to the scoring for sadism, torture, or excessive brutality. The Court of Appeals reversed the trial court's scoring decision, commenting:

would require this Court to read the multiple-offender language into the OV at issue, in this case OV 10, in violation of our principles of statutory interpretation.[17]

We are not persuaded by the prosecution's claim that a defendant may have points assessed under OV 10 solely on the basis of the conduct of his or her co-offenders because the language simply requires that "[p]redatory conduct was involved" without specifying that the predatory conduct must have been the defendant's.[18] We note that OVs 1 and 3 are similarly worded in the passive voice, yet the Legislature found it necessary to include a separate subsection that explicitly requires a court to assess the defendant the same number of points as his or her co-offenders.[19] If the presence of passive language in an OV required a sentencing court to assess a defendant points solely on the basis of the conduct of the defendant's co-offenders, then those separate subsections in OVs 1 and 3 would be rendered surplusage, in violation of this Court's principles of statutory interpretation.[20]

> [W]hile defendant was present and armed during the commission of the crimes here, he did not himself commit, take part in, or encourage others to commit acts constituting "sadism, torture, or excessive brutality" under OV 7. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that "[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points." For OV 7, only the defendant's actual participation should be scored. [*Hunt*, 290 Mich App at 325-326 (citations omitted) (second and third alterations in original).]

[17] See *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002) ("It is a well-established rule of statutory construction that this Court will not read words into a statute.").

[18] MCL 777.40(1)(a).

[19] See MCL 777.31(2)(b); MCL 777.33(2)(a).

[20] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase,

Moreover, the Legislature has demonstrated in other OVs that its failure to specify the defendant being sentenced as the actor does not itself mean that a sentencing court should assess the defendant points solely on the basis of his or her co-offenders' conduct. For example, OV 16 (property obtained, damaged, lost, or destroyed), MCL 777.46(1)(b) through (e), lists the points to be assessed if "[t]he property had a value" ranging from $200 to more than $20,000 or if "[n]o property was obtained, damaged, lost, or destroyed or the property had a value of less than $200.00." Subsection (2)(a) then states that "[i]n multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved . . . ."[21] If the Legislature's failure to specify that the assessment of points under OV 16 must be based on the defendant's conduct meant that the defendant must have points assessed for property damage, loss, or destruction attributed solely to his or her co-offenders, then there would have been no need for Subsection (2)(a) to instruct courts to aggregate the value of the property involved in multiple-offender cases. OV 11 (criminal sexual penetration), MCL 777.41(1), requires the assessment of points if at least one "sexual penetration occurred" without specifying that it must be the defendant who engaged in that sexual penetration. Subsections (2)(a) and (b) then indicate that the Legislature was nonetheless referring to the defendant's conduct, not the conduct of the defendant and his or her co-offenders. That is, Subsection (2)(a) directs the court to "[s]core all sexual penetrations of the victim *by the offender* [*defendant*] arising out of the sentencing offense,"[22] and Subsection

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and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

[21] MCL 777.46(2)(a).

[22] MCL 777.41(2)(a) (emphasis added).

(2)(b) specifies that "[m]ultiple sexual penetrations of the victim *by the offender* [*defendant*] extending beyond the sentencing offense may be scored in offense variables 12 or 13 [MCL 777.42 and MCL 777.43]."[23] Thus, it appears clear that even when an OV is phrased in a manner that does not explicitly refer to the defendant as the actor, the court may not assess that defendant points solely on the basis of his or her co-offender's conduct unless the OV at issue explicitly directs the court to do so.

Applying this analysis to the instant case, we conclude that the trial court erred by assessing defendant 15 points for OV 10 because the record indicates that the court based its assessment of points entirely on the conduct of defendant's co-offenders. That is, the trial court supported its score by explaining that two of the people defendant drove to Hamtramck "went out to the corner to watch for an appropriate victim . . . ." The trial court thus considered only the conduct of defendant's co-offenders in watching for an appropriate victim when it assessed defendant 15 points for predatory conduct. For the reasons described above, this was in error.[24] The Court of Appeals likewise erred by concluding that the trial court's scoring of OV 10 was supported by defendant's own conduct. Because the trial court did not itself find that defendant's own conduct was predatory in nature, the Court of Appeals

[23] MCL 777.41(2)(b) (emphasis added).

[24] In the alternative, the prosecution argues that defendant should have 15 points assessed under OV 10 for aiding and abetting his co-offenders' predatory conduct. We decline to address this argument given that the trial court did not score OV 10 under an aiding-and-abetting theory. Instead, we leave it to the trial court on remand to determine whether it is appropriate to consider this alternative argument.

failed to review the trial court's findings for clear error as required by *People v Hardy*.[25]

IV. CONCLUSION

We reverse in part the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with our holding that a sentencing court may not assess a defendant 15 points for predatory conduct under OV 10 solely on the basis of the predatory conduct of the defendant's co-offenders. In all other respects, leave to appeal is denied because we are not persuaded that this Court should review the remaining question presented.

YOUNG, C.J., and MARKMAN, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with ZAHRA, J.

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[25] *Hardy*, 494 Mich at 438.

HODGE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 149043. Argued October 13, 2015 (Calendar No. 2). Decided June 6, 2016.

Linda Hodge filed suit against State Farm Mutual Automobile Insurance Company in the 36th District Court for first-party no-fault benefits related to injuries she sustained when she was struck by a car insured by State Farm. Hodge's complaint indicated that the amount in controversy was $25,000, which was within the district court's jurisdiction. During discovery, State Farm came to believe that Hodge would present at trial proof of damages in excess of the district court's $25,000 jurisdictional limit. The 36th District Court, Kenneth J. King, J., denied State Farm's motion in limine to prevent Hodge from presenting evidence of claims exceeding $25,000 and to prevent the jury from awarding damages in excess of $25,000. At trial, Hodge did present proof of injuries exceeding $25,000, and the jury returned a verdict of $85,957. The district court reduced the verdict to the jurisdictional limit of $25,000, and it awarded $1,769 in no-fault interest. State Farm appealed in the Wayne Circuit Court, claiming that the amount in controversy exceeded the district court's jurisdictional limit and that capping Hodge's damages at $25,000 could not cure the defect. The circuit court, Brian R. Sullivan, J., agreed and reversed the district court's order of judgment. The Court of Appeals denied Hodge's application for leave to appeal. The Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted, and the Court of Appeals consolidated it with *Moody v Home Owners Ins Co*, another case that raised the same jurisdictional question. The Court of Appeals, MARKEY, P.J., and FITZGERALD and OWENS, JJ., affirmed the circuit court's decision that the district court was divested of jurisdiction when pretrial discovery, counsel's arguments, and the evidence presented at trial pointed to damages in excess of $25,000. *Moody*, 304 Mich App 415 (2014). Plaintiffs in the consolidated cases appealed in the Supreme Court. The Supreme Court initially granted leave to appeal in *Moody v Home Owners* and held Hodge's appeal in abeyance pending the outcome in *Moody*. The Supreme Court subsequently granted plain-

tiffs' motions in *Moody* to dismiss their appeals, vacated the abeyance order in *Hodge*, and granted Hodge leave to appeal two issues: (1) whether a district court is divested of its subject-matter jurisdiction when a plaintiff alleges less than $25,000 in damages but seeks more than $25,000 at trial—that is, under such circumstances, whether the "amount in controversy" exceeds $25,000, and (2) if not, whether the district court is otherwise divested of its subject-matter jurisdiction, under such circumstances, on the basis that the plaintiff acted fraudulently or in bad faith by alleging damages within the district court's jurisdiction.

In a unanimous opinion by Justice LARSEN, the Supreme Court *held*:

The "amount in controversy" is determined by the *ad damnum* clause in a plaintiff's complaint. When a complaint alleges damages not exceeding $25,000, the district court has subject-matter jurisdiction over that complaint. A district court is not divested of its subject-matter jurisdiction over a complaint alleging an amount in controversy not exceeding $25,000 even though the plaintiff's pretrial discovery answers, counsel's arguments before trial, and evidence presented at trial all indicate that the plaintiff's damages far exceeded the district court's jurisdictional limit. In this case, Hodge filed in district court a complaint for damages not exceeding $25,000. Pretrial conduct and the introduction of evidence at trial indicated that Hodge's damages far exceeded $25,000. However, the circuit court wrongly decided that the district court was divested of jurisdiction when the amount of damages shown exceeded $25,000. The district court was not divested of jurisdiction because the complaint claimed damages within the district court's jurisdictional limit even though the damages actually exceeded $25,000. In the absence of bad faith, the prayer for relief controls the amount in controversy and the amount of damages a plaintiff may recover.

Reversed, the district court judgment reinstated, and the case remanded to the district court for further proceedings.

Justice MARKMAN concurred with the majority's opinion in full and wrote separately to explain his view that a plaintiff pleads in bad faith when he or she alleges an "amount in controversy" consistent with the district court's $25,000 jurisdictional limit with the intention to present evidence and argument inconsistent with that amount. The question of proper jurisdiction does not end with a plaintiff's willingness to accept damages capped by the district court's jurisdictional limit. A plaintiff may gain an

unfair advantage by pleading in bad faith, and the district court must divest itself of jurisdiction when a plaintiff has obtained the district court's jurisdiction by pleading in bad faith. The district court has a continuing obligation to be vigilant in identifying bad-faith conduct, and it must be prepared to question sua sponte its own jurisdiction at any stage of the proceeding.

DISTRICT COURTS — JURISDICTION — AMOUNT IN CONTROVERSY — DETERMINED BY PLEADINGS.

The "amount in controversy," for purposes of determining jurisdiction, is the amount reflected in a plaintiff's complaint; in the absence of bad faith, a district court is not divested of its jurisdiction when a plaintiff pleads an amount of damages within the district court's jurisdiction and then establishes damages exceeding the district court's $25,000 jurisdictional limit.

Richard E. Shaw for plaintiff.

Hewson & Van Hellemont, PC (by *James F. Hewson* and *Stacey L. Heinonen*), for defendant.

Amicus Curiae:

James G. Gross, PLC (by *James G. Gross*), for Auto Club Insurance Association.

LARSEN, J. This case involves the proper application of MCL 600.8301, which grants the district court "exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." For at least 160 years, Michigan courts have held that the allegations in the complaint establish the amount in controversy.[1] We affirm that principle today.

This case arises out of a lawsuit for no-fault damages filed in the 36th District Court. Plaintiff, Linda

[1] See *Strong v Daniels*, 3 Mich 466, 473 (1855).

Hodge, was struck by a car in Detroit and sustained serious injuries. She brought this suit for first-party no-fault benefits against defendant, State Farm Mutual Automobile Insurance Company, which insured the driver who struck her. She sought damages for her medical expenses, loss of wages, and attendant-care needs. In two separate parts of her complaint, Hodge stated that she sought damages "not in excess of $25,000."

During discovery, State Farm came to believe that Hodge would present at trial proof of damages in excess of $25,000. Such proofs, in State Farm's view, would take the "amount in controversy" above the district court's jurisdictional limit. State Farm, therefore, filed a motion in limine, seeking to prevent Hodge from presenting evidence of claims exceeding $25,000 and to prevent the jury from awarding damages above that limit. The district court denied the motion.

At trial, Hodge did present proof of injuries exceeding $25,000, including more than $150,000 in attendant-care services alone. At the conclusion of the trial, the jury returned a verdict of $85,957. The district court then reduced its judgment for Hodge to $25,000 in damages and $1,769 in no-fault interest.

State Farm appealed in the Wayne Circuit Court, claiming that the amount in controversy exceeded the district court's jurisdictional limit and that capping Hodge's recovery at $25,000 could not cure the defect. The circuit court agreed and reversed the district court's order of judgment.[2]

The Court of Appeals initially denied plaintiff's application for leave to appeal. After this Court re-

[2] *Hodge v State Farm Mut Auto Ins Co*, unpublished order of the Wayne Circuit Court, issued February 1, 2012 (Docket No. 10-012109-AV).

manded for consideration as on leave granted,[3] the Court of Appeals consolidated this case with another brought in district court by plaintiff's counsel that raised the same jurisdictional question. In the consolidated appeal, the Court of Appeals affirmed the circuit court's decision, holding that although the district court's jurisdiction "will most often be determined by reviewing the amount of damages or injuries a party claims in his or her pleadings,"[4] the district courts here were divested of jurisdiction when the "pretrial discovery answers, the arguments of [plaintiff's] counsel before trial and the presentation of evidence at trial" pointed to damages in excess of $25,000.[5]

The plaintiff in each of the consolidated cases sought leave to appeal in this Court. We initially granted leave to appeal in the companion case, *Moody v Home Owners*,[6] and held this case in abeyance pending our decision in *Moody*.[7] However, this Court subsequently granted the plaintiffs-appellants' motion to dismiss their own appeal in *Moody*.[8] We then vacated our abeyance order and granted leave to appeal in this case, limited to two issues:

> (1) whether a district court is divested of subject-matter jurisdiction when a plaintiff alleges less than $25,000 in damages in his or her complaint, but seeks more than $25,000 in damages at trial, i.e., whether the "amount in controversy" exceeds $25,000 under such circumstances . . . and, if not, (2) whether such conduct nevertheless divests the district court of subject-matter jurisdiction

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[3] *Hodge v State Farm Mut Auto Ins Co*, 493 Mich 937 (2013).

[4] *Moody v Home Owners Ins Co*, 304 Mich App 415, 430; 849 NW2d 31 (2014).

[5] *Id*.

[6] *Moody v Home Owners Ins Co*, 497 Mich 866 (2014).

[7] *Hodge v State Farm Mut Auto Ins Co*, 853 NW2d 334 (Mich, 2014).

[8] *Moody v Home Owners Ins Co*, 858 NW2d 462 (Mich, 2015).

> on the basis that the amount alleged in the complaint was made fraudulently or in bad faith.[9]

The 1963 Michigan Constitution, art 6, § 1, establishes the circuit court as a "trial court of general jurisdiction" and authorizes the Legislature to establish courts of limited jurisdiction. The Legislature exercised this constitutional authority in 1968 by creating the district court.[10] MCL 600.8301(1) establishes the district court's limited jurisdiction:

> The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00.[11]

The plain language of MCL 600.8301(1), read in conjunction with art 6, § 1 and MCL 600.605,[12] establishes that, in civil actions where no other jurisdictional statute applies, the district court is limited to deciding cases in which the amount in controversy does not exceed $25,000.[13] The district court, therefore, may

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[9] *Hodge v State Farm Mut Auto Ins Co*, 497 Mich 957 (2015).

[10] MCL 600.8101, as enacted by 1968 PA 154.

[11] When the Legislature established the district court in 1968, it set the court's jurisdictional limit at $3,000. See 1968 PA 154. The Legislature has twice raised the jurisdictional limit: to $10,000 in 1971, see 1971 PA 148, and to $25,000 in 1996, see 1996 PA 388.

[12] "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."

[13] The 1963 Michigan Constitution, art 6, § 1 dictates that the circuit court is to be the only court of general jurisdiction, but that the Legislature may establish courts of limited jurisdiction. The Legislature slightly restricted the circuit court's jurisdiction in MCL 600.605 by removing the circuit court's original jurisdiction in cases "where exclusive jurisdiction is given in the constitution or by statute to some other court . . . ." The Legislature granted such exclusive jurisdiction to the district court in MCL 600.8301(1). However, because the Legislature only has the authority to establish courts of limited jurisdiction, the

not award damages in excess of that amount.[14] The question before this Court is how to determine the "amount in controversy": by the pleadings or by the proofs at trial?

Our cases have long held that courts are to determine their subject-matter jurisdiction by reference to the pleadings. As far back as 1855, when determining whether the circuit court or the justice of peace had jurisdiction over a dispute,[15] this Court held that "jurisdiction must be determined . . . , where it depends on amount, by the sum claimed in the declaration or writ."[16] This "well settled" rule would apply, the Court surmised, even if the plaintiff presented proof of damages, or the jury returned a verdict, exceeding the court's jurisdictional limit.[17] Neither the parties nor our own research has revealed any case deviating from this common-law rule.[18]

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district court's jurisdiction is limited to the explicit grant of Chapter 83 of the Revised Judicature Act of 1961. See MCL 600.8301 *et seq*.

[14] See *Zimmer v Schindehette*, 272 Mich 407, 409; 262 NW 379 (1935) (declaring void a judgment rendered by a justice of the peace that was in excess of his jurisdiction). See also *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 567; 840 NW2d 375 (2013) ("We are cognizant of the fact that, generally speaking, a district court cannot render a judgment that exceeds its jurisdictional limit.").

[15] The 1850 Michigan Constitution, art 6, § 18, specified that "justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars . . . ." The 1908 Michigan Constitution had a similar clause. See Const 1908, art 7, § 16.

[16] *Strong*, 3 Mich at 472. This rule appears to be even older than *Strong*. The Court in *Strong* noted that even before the adoption of the 1850 Constitution, at issue in that case, "it was never doubted, that the test of jurisdiction was the amount claimed in the plaintiff's writ." *Id*. at 470.

[17] *Id*. at 473 ("[T]he justice will not be ousted of his jurisdiction by the jury returning a verdict, or by proof of damages beyond his jurisdiction.").

[18] We note that the federal courts also apply this principle. See, e.g., *St Paul Mercury Indem Co v Red Cab Co*, 303 US 283, 288; 58 S Ct 586; 82

Nor is there any reason to believe that the Legislature intended to depart from this well-settled practice when it created the district court and established by statute the monetary limits on its jurisdiction. When the Legislature, without indicating an intent to abrogate the common law,

> borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[19]

L Ed 845 (1938) ("The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that . . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith."). Several other states are in accord. See, e.g., *Brunaugh v Worley*, 6 Ohio St 597, 598 (1856) ("The jurisdiction of the court of common pleas depends upon the amount claimed in the petition."); *Wagner v Nagel*, 23 NW 308, 309 (Minn, 1885) ("It is well settled in this court that where the jurisdiction of a court depends upon 'the amount in controversy,' this is determined by the amount *claimed*."); *Sellery v Ward*, 21 Cal 2d 300, 304; 131 P2d 550 (1942) ("Where the action is brought in good faith and the cause of action stated is within the jurisdiction of the court in which it is commenced, the mere fact that the judgment is for less than the jurisdictional amount of that court does not establish that it was without jurisdiction."); *Brannon v Pacific Employers Ins Co*, 148 Tex 289, 294; 224 SW2d 466 (1949) ("It is a fundamental rule that in determining the jurisdiction of the trial court, the allegations of the petition made in good faith are determinative of the cause of action."); *Holmquist v Spinelli*, 139 Conn 429, 431; 94 A2d 621 (1953) ("From the earliest times in this state, and in a long line of cases, it has been held that the amount of the matter in demand is to be discovered only by reference to the complaint."); *White v Marine Transport Lines, Inc*, 372 So 2d 81, 84 (Fla, 1979) ("[T]he good faith demand of the plaintiff at the time of instituting suit determines the ability of the particular court to entertain the action.").

[19] *Sekhar v United States*, 570 US ___, ___; 133 S Ct 2720, 2724; 186 L Ed 2d 794 (2013), quoting *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952). See also *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013) ("[W]hen the Legislature chooses to

Here, the statute neither defines the critical term, "amount in controversy,"[20] nor in any other way suggests an intent to depart from the long-established rule that the pleadings determine the amount in controversy for purposes of the court's subject-matter jurisdiction.

Thus, it is not quite right to say, as did the Court of Appeals, that nothing in MCL 600.8301(1),[21] MCR 2.227(A)(1),[22] or MCR 2.116(C)(4)[23] "requires that a court limit its jurisdictional query to the amount in

employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning."); *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 41; 761 NW2d 269 (2008) ("[W]hen enacting legislation, the Legislature is presumed to be fully aware of existing laws, including judicial decisions.").

[20] "Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). If a word or phrase is a term of art, it "shall be construed and understood according to [its] peculiar and appropriate meaning." MCL 8.3a. Although the term "amount in controversy" was not specifically used in the 1850 or 1908 Constitutions, it has long been a part of our state's legal lexicon and was used in nineteenth-century Court opinions to indicate the amount at stake in the suit. See, e.g., *Olcott v Hanson*, 12 Mich 452, 455 (1864) (opinion by MARTIN, J.); *Truesdail v Ward*, 24 Mich 117, 120 (1871) (opinion by GRAVES, J.). That amount was always determined based upon the amount claimed in the pleadings. See, e.g., *Strong*, 3 Mich at 470.

[21] "The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00."

[22] "When the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue."

[23] "The motion [for summary disposition] may be based on one or more of these grounds, and must specify the grounds on which it is based: . . . The court lacks jurisdiction of the subject matter."

controversy alleged in the pleadings."[24] Instead, the statute and court rules are properly read as incorporating the long-settled rule that the jurisdictional amount is determined on the face of the pleadings.

Both the Court of Appeals and defendant urge that dictionary definitions of statutory terms support a contrary result. We find the cited references unhelpful. The Court of Appeals noted that *Black's Law Dictionary* defines "amount in controversy"[25] as "[t]he damages claimed or relief demanded by the injured party in a lawsuit."[26] But this definition is at least as consistent with the common-law rule as it is with the new rule espoused by the Court of Appeals. The dispute here is over *how* and *when* to determine the "damages claimed or relief demanded": on the pleadings or on the proofs? As a method for determining the district court's subject-matter jurisdiction, then, *Black's* definition of "amount in controversy" is simply incomplete.

Defendant's resort to the dictionary fares no better. MCR 2.227(A)(1) allows a court to transfer an action to another tribunal when it "determines that it lacks jurisdiction of the subject matter of the action." Defendant cites multiple dictionaries for the proposition that "determines" implies the result of research or investigation. From this, defendant argues that a court may look beyond the pleadings to determine its jurisdiction. But the conclusion does not clearly follow from the premise. Even if "to determine" implies that inquiry will precede decision, neither the court rule nor com-

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[24] *Moody*, 304 Mich App at 426.

[25] When defining a legal term or phrase with a pedigree as long as "amount in controversy," little is likely to be gained from defining the individual words it comprises. Thus, we find unpersuasive the Court of Appeals' close examination of the individual words "amount" and "controversy."

[26] *Id*. at 430, quoting *Black's Law Dictionary* (9th ed).

mon English usage conveys the sense that the inquiry need be prolonged. Just as government officials routinely "determine" age or identity by looking at photo ID, a court might well "determine" the jurisdictional amount by looking at the pleadings.

We are left, therefore, with the firm impression that in adopting MCL 600.8301, the Legislature intended to continue the longstanding practice of determining the jurisdictional amount based on the amount prayed for in the complaint. The Court of Appeals was aware of this "ancient" common-law rule,[27] but thought it inapplicable because the plaintiff pleaded "a claim for relief ostensibly within the limits of the district court's subject-matter jurisdiction but then plac[ed] in dispute through evidence and argument at trial an amount of damages much greater than the court's jurisdictional limit."[28] We recognize, as did the Court of Appeals, the potential for "artful pleading" that the common-law rule creates,[29] and we have our own concerns about the implications of the rule.[30] But, absent a finding of bad

[27] *Id*. at 432.

[28] *Id*. at 433.

[29] *Id*.

[30] For example, an unscrupulous attorney might, without fully informing his client, limit his client's recovery to $25,000 by filing in district court but then seek attorney fees based on the full amount of damages returned by the jury, thereby sacrificing his client's interests to his own. In this regard, we remind the trial courts that an attorney is entitled to recover a *reasonable* fee for advising and representing a client in a personal protection insurance (PIP) action. MCL 500.3148(1). After calculating the baseline attorney fee figure, the trial court should consider, though is not limited to, a number of factors when determining a reasonable fee for such representation. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281; 884 NW2d 257 (2016). These factors are:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,

faith,[31] we do not believe that these concerns affect the district court's jurisdiction, which has always been determined based on the amount alleged in the pleadings.

The common-law rule is marked not only by its longevity but by its simplicity. The *ad damnum* clause in the plaintiff's complaint is a straightforward mea-

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(2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,

(3) the amount in question and the results obtained,

(4) the expenses incurred,

(5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent. [*Id*. at 282.]

Factor (3) suggests that the fees awarded must be reasonable in light of the $25,000 limit on a plaintiff's recovery in district court.

[31] This Court has held that a court will not retain subject-matter jurisdiction over a case "when . . . fraud upon the court is apparent" from allegations pleaded in bad faith. *Fix v Sissung*, 83 Mich 561, 563; 47 NW 340 (1890). In *Fix*, this Court dismissed the plaintiff's suit as being brought in bad faith because the amount claimed was "unjustifiable" and could not be proved. *Id*. However, beyond that holding, our cases give no indication of what would constitute bad faith sufficient to oust the court of jurisdiction. The Court of Appeals seemed concerned with plaintiffs filing in district court knowing that provable actual damages exceeded the $25,000 jurisdictional limit. See *Moody*, 304 Mich App at 431. We question, but do not decide, whether a fully-informed plaintiff acts in bad faith by filing a claim in district court, thereby limiting his own recovery to $25,000. In this case, defendant made no allegation of bad faith in the pleadings, and there has been no finding of bad faith by the district court.

sure of the court's jurisdiction. And its accompanying limit on recovery should deter fully-informed plaintiffs from too-readily seeking to litigate a more valuable claim in district court. By contrast, the rule articulated by the Court of Appeals renders the district court's jurisdiction contingent and uncertain and raises a host of new complications. The Court of Appeals believed that the district court in the instant case was divested of jurisdiction when the "pretrial discovery answers, the arguments of . . . counsel before trial, and the presentation of evidence at trial[] all showed that" what it deemed the "amount in controversy . . . far exceeded" the district court's jurisdictional limit.[32] But if plaintiff's proofs here were excessive, would proofs exceeding the jurisdictional limit by $1,000 be enough to divest the district court of jurisdiction? $100? $1? What would be the effect on the resources of the court system? If a plaintiff presented evidence over the jurisdictional cap on the last day of testimony, would the entire trial have to begin anew in the circuit court? Could a losing plaintiff conveniently "discover" and submit receipts above the jurisdictional amount on the last day of a trial that is not going his way? Would the district court be divested of subject-matter jurisdiction if a jury returned a verdict beyond the jurisdictional limit even though neither party had argued for that amount? What would happen if a plaintiff wished to present multiple theories of recovery? None of these questions attend the longstanding common-law rule.

We, therefore, hold what the jurisprudence of this state has long established: in its subject-matter jurisdiction inquiry, a district court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings, calculated exclusive of fees,

[32] *Moody*, 304 Mich App at 430-431.

costs, and interest.[33] Hodge's complaint prayed for money damages "not in excess of $25,000," the jurisdictional limit of the district court. Even though her proofs exceeded that amount, the prayer for relief controls when determining the amount in controversy and the limit of awardable damages. Because there were no allegations, and therefore no findings, of bad faith in the pleadings, the district court had subject-matter jurisdiction over the plaintiff's claim.

We reverse the Court of Appeals' decision that the district court lacked subject-matter jurisdiction, reinstate the judgment of the district court, and remand to the district court for further proceedings.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with LARSEN, J.

MARKMAN, J. (*concurring*). At issue here is the subject-matter jurisdiction of the district court, which is exclusive in "civil actions when the amount in controversy does not exceed $25,000.00." MCL 600.8301(1). I join the majority because I agree that "amount in controversy" as used in MCL 600.8301(1) refers to the "prayer for relief set forth in the plaintiff's pleadings . . . ." I further agree that a trial court may be ousted of subject-matter jurisdiction when "fraud upon the court is apparent" from pleadings made in "bad faith." I write separately only to identify circumstances that, in my view, might raise questions concerning "bad faith" pleading and thereby warrant dismissal of a case for lack of jurisdiction. While

[33] See *Krawczyk v Detroit Auto Inter-Ins Exch*, 117 Mich App 155, 163; 323 NW2d 633 (1982) ("As a general rule, neither costs, attorney fees nor interest is considered in determining the jurisdictional amount."), affirmed in part, reversed in part on other grounds, 418 Mich 231 (1983).

bad-faith pleadings are rare, when these do occur, they undermine the law of our state and the integrity of our judicial process, and they give rise to conditions at trial in which a party may be unfairly prejudiced.

I. FACTS AND HISTORY

This case arose when plaintiff sued defendant in the 36th District Court for first-party no-fault benefits after plaintiff had been struck by a vehicle driven by a person insured by defendant. Plaintiff's complaint alleged bodily injury, including a "closed head injury," "pains in left shoulder, back, neck area, [and] lower back," and a "bruise on [the] left ankle." She also alleged financial injury, including "expenses for care, recovery, or rehabilitation," "loss of wages," "replacement services," and "attendant care." In her complaint's prayer for relief, plaintiff sought "damages in whatever amount Plaintiff is found to be entitled not in excess of 25,000.00 . . . ." The parties then engaged in discovery, and, based on information provided by plaintiff, defendant estimated that plaintiff's claim was worth nearly $250,000. As a result, defendant filed a motion in limine to prevent plaintiff from offering at trial evidence that her claim exceeded $25,000, but the district court denied that motion. Plaintiff eventually submitted evidence at trial of injuries exceeding $25,000, including more than $150,000 in attendant-care services. The jury returned a verdict of $85,957, which the district court duly reduced to $25,000.

Defendant appealed in the Wayne Circuit Court, arguing that the district court lacked subject-matter jurisdiction. The circuit court concluded that plaintiff claimed damages exceeding $25,000 and thus reversed the district court. Plaintiff then appealed in the Court of Appeals. After we directed that Court to consider the

case as on leave granted, it agreed with the circuit court, concluding that the district court had been divested of jurisdiction when plaintiff "presented evidence of damages far exceeding [its] $25,000 subject-matter jurisdiction." *Moody v Home Owners Ins Co*, 304 Mich App 415, 431; 849 NW2d 31 (2014). We then granted leave to appeal on two issues:

> (1) whether a district court is divested of subject-matter jurisdiction when a plaintiff alleges less than $25,000 in damages in his or her complaint, but seeks more than $25,000 in damages at trial, i.e., whether the "amount in controversy" exceeds $25,000 under such circumstances, see MCL 600.8301(1); and, if not, (2) whether such conduct nevertheless divests the district court of subject-matter jurisdiction on the basis that the amount alleged in the complaint was made fraudulently or in bad faith. [*Hodge v State Farm Mut Auto Ins Co*, 497 Mich 957, 957-958 (2015).]

II. ANALYSIS

I agree with the majority's analysis of the two issues on which this Court granted leave. I write separately only to elaborate on my views as to the second issue—under what circumstances may a prayer for relief, although nominally falling within the district court's statutory "amount in controversy" requirement, nonetheless clearly exhibit bad faith and thereby warrant dismissal.[1] In my view, the relevant jurisdictional inquiry does not automatically come to an end when a plaintiff evidences a willingness to accept an amount

[1] See, e.g., 20 Am Jur 2d, Courts, § 103 ("The plaintiff's pleadings are generally determinative as to the amount in controversy unless the defendant specifically alleges and proves the amount was pleaded *merely as a sham for the purpose of wrongfully obtaining jurisdiction* or can readily establish that the amount in controversy does not fall within the court's jurisdictional limits.") (emphasis added).

less than the jurisdictional maximum; rather, particular circumstances may warrant a district court's inquiring more deeply into whether the amount in controversy was, at the time it was alleged, alleged in bad faith.[2] I emphasize that bad-faith pleadings to obtain subject-matter jurisdiction have been extraordinarily rare—indeed this and the two cases mentioned in note 3 of this opinion are the first brought to this Court's attention during my tenure, and I believe further inquiry in this regard must be undertaken.[3] For the reasons set forth below, however, I believe it is important that it be made clear, for the integrity of both the legislative and judicial branches, that this Court will not tolerate cases or controversies that ought to be heard in one court being heard in another as a result of a bad-faith pleading.

A. BAD FAITH

Subject-matter jurisdiction "is the power to hear and determine a cause or matter." *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992) (quotation marks and citation omitted). Because a court has no inherent subject-matter jurisdiction, such jurisdiction must be

[2] One federal practice treatise states that "[u]nder well-settled principles of pleading, the plaintiff is the master of the statement of his claim." 14AA Fed Prac & Proc Juris (4th ed), § 3702. But the treatise goes on to note that the plaintiff's choice controls only "absent a showing of bad faith." *Id*. In the instant case, because the present record does not sufficiently reflect that plaintiff's allegations were made in bad faith, because "defendant made no allegation of bad faith in the pleadings," and because "there has been no finding of bad faith by the district court," see the majority opinion at note 31, I believe that this Court currently lacks a basis to conclude that plaintiff pleaded in bad faith.

[3] Two other such cases recently have come before the Court. *Moody v Home Owners Ins Co*, 497 Mich 866; 858 NW2d 462 (2015); *Madison v AAA of Mich*, 858 NW2d 463 (2015). Counsel in these two cases is also plaintiff's counsel in the instant case.

"conferred upon [the court] by the power which creates it." *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). Jurisdiction accordingly "arises by law," and a court must, notwithstanding a party's stipulation, consent, or waiver, "take notice of the limits of its authority" in order to safeguard the integrity of the judicial process by ensuring that it does not exercise authority it does not have. *Bowie*, 441 Mich at 56. Hence, if the court "recognize[s] its lack of jurisdiction," it must "act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *Fox v Bd of Regents of Univ of Mich*, 375 Mich 238, 242; 134 NW2d 146 (1965) (quotation marks and citation omitted); accord *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) ("[A] court at all times is required to question sua sponte its own jurisdiction . . . .") (quotation marks and citation omitted).

This Court has long recognized that when a plaintiff's pleadings are clearly made in bad faith for the purpose of satisfying a trial court's subject-matter jurisdiction, the trial court is ousted of jurisdiction and must dismiss the matter. See *Fix v Sissung*, 83 Mich 561, 563; 47 NW 340 (1890). *Fix* concerned a dispute between neighbors stemming from a gaggle of the plaintiff's geese "trespassing" on the defendant's property. The defendant took possession of the geese and refused to return them unless the plaintiff first paid for property damage caused by the geese and for the cost of feeding them. The plaintiff then sued the defendant in the circuit court for return of the geese. The defendant moved to dismiss for lack of subject-matter jurisdiction, arguing that because the geese were worth less than $100, only a state justice of the peace could hear the case.[4] The plaintiff re-

[4] Const 1850, art 6, § 18 ("In civil cases justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars . . . .").

sponded with a declaration that the geese were worth $200, and the trial court permitted the case to proceed. However, it also warned the plaintiff that it would dismiss the case if he "should fail to bring himself within the statute"—that is, within the jurisdictional limit—based on the evidence presented at trial. *Id*. Notwithstanding this admonition, the "plaintiff offered no proof [at trial] as to the value of his geese, and strenuously opposed the introduction of evidence by the defendant of their value." *Id*. The trial court admitted such evidence, which showed that the geese were worth only $9, and dismissed the case.

The plaintiff appealed in this Court, arguing that his case fell within the circuit court's jurisdiction because he had alleged the geese's value to be $200, well above the $100 jurisdictional limit of state justices of the peace. We acknowledged that a trial court's jurisdiction may be properly retained on the basis of a good-faith allegation of property value exceeding the jurisdictional limit, even where the value proved at trial does not ultimately exceed the jurisdictional limit. But because the plaintiff's declaration that the geese were worth $200 was "unjustifiable," we concluded that "the value alleged . . . was made in bad faith, and was a fraud upon the court." *Id*. Accordingly, we affirmed the trial court's dismissal. *Fix* thus stands for the proposition that a court subject to a jurisdictional limit may dismiss a complaint for lack of subject-matter jurisdiction, notwithstanding that the jurisdictional allegations are nominally valid, when the court concludes that those allegations were clearly made in bad faith.

As *Fix* demonstrates, a plaintiff pleads in bad faith by pleading an amount in controversy with an intention to present evidence and argument—i.e., to litigate

that case—in a manner inconsistent with that amount. Such bad faith in the pleadings may be assessed based on evidence subsequently offered at trial, but it is important to recognize that the result in *Fix* was not a product of bad faith exhibited *at trial*, but a function of bad faith evidenced in the *complaint*, which became clearly apparent only after the plaintiff's submissions at trial demonstrated both that he had fabricated the value of the geese in order to satisfy the court's jurisdictional threshold and that he had no initial intention to present a $200 case to the court.

The plaintiff in *Fix* thus inflated the value of his claim to exceed a court's *minimum* jurisdictional limit. By contrast, plaintiff in the instant case may have diminished the value of her claim to avoid exceeding a court's *maximum* jurisdictional limit.[5] Notwithstanding the seeming distinction between *Fix* and the instant case, *Fix* is nonetheless clear, as the majority recognizes, that a court's lawful jurisdiction cannot be premised on a pleading made in bad faith. And there is no logical reason why the *Fix* principle should be limited to jurisdiction obtained by a bad-faith pleading that *overstates* the value of a claim and not also apply

[5] Plaintiff sought $25,000 in damages, yet discovery and evidence subsequently indicated that her claim may have been worth as much as $250,000. Questions of bad faith aside, why a plaintiff might be prompted to reduce recovery by as much as 90% in order to have it heard in one judicial venue instead of another is itself a matter of considerable consequence for the fairness of the justice system and the equal rule of law, although beyond the scope of inquiry in this case. At the very least, however, I do believe that plaintiff's attorney had a professional and ethical obligation to explain clearly to the client both the rationale for such a substantial reduction in recovery and the likely waiver of the right to sue for the balance of the claim in excess of the jurisdictional maximum. MRPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); see also MRPC 1.7(b).

to jurisdiction obtained by a bad-faith pleading that *understates* the value of a claim. A plaintiff simply does not have unchecked discretion to create jurisdiction in either way. See, e.g., *In re Return of Forfeited Goods*, 452 Mich 659, 671; 550 NW2d 782 (1996) ("It is well established that [j]urisdiction of the subject-matter cannot be given by consent.") (quotation marks and citation omitted; alteration in original).

B. DISTRICT COURT JURISDICTION

Having set forth *Fix*'s general principle that pleading in bad faith ousts a trial court of jurisdiction, I turn then to the specific question of the jurisdiction of the court at issue in this case, the district court. Our Constitution establishes "one trial court of *general* jurisdiction known as the circuit court" and authorizes the Legislature to further establish "courts of *limited* jurisdiction." Const 1963, art 6, § 1 (emphasis added).[6] The Legislature in response established the district court,[7] which "has *exclusive* jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00."[8] MCL 600.8301(1) (emphasis added). I agree with the majority's straightforward observation

[6] See also MCL 600.605 ("Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.").

[7] MCL 600.8101(1) ("A district court is established in the state.").

[8] Many other states have trial courts whose jurisdictions are limited by dollar thresholds. See Dollar Amount Jurisdiction for Tort, Contract, Real Property, and Small Claims Filings in State Trial Courts, 2010, available at <http://www.courtstatistics.org/~/media/Microsites/Files/CSP/SCCS/2010/Civil-Dollar_Amount_Jurisdiction> [https://perma.cc/69K6-MM8A]; see also 21 CJS, Courts, § 22, pp 31-32 ("Under various constitutional or statutory provisions, superior courts of general jurisdiction are limited in their jurisdiction to cases involving amounts in excess of a specified

that the district court is thereby "limited to deciding cases" within that amount.

By separating disputes according to whether the amount in controversy exceeds or does not exceed $25,000, § 8301(1) reflects the Legislature's intention to classify civil cases according to their value.[9] Accordingly, a case with a value exceeding $25,000 is intended for the circuit court and constitutes a "circuit court case," and a case with a value not exceeding $25,000 is intended for the district court and constitutes a "district court case." It follows that a plaintiff with a "circuit court case" acts in accordance with the law when he or she pleads the appropriate amount in controversy in the circuit court, and a plaintiff with a "district court case" acts in accordance with the law when he or she pleads the appropriate amount in controversy in the district court.

But, of course, it may come to pass as a result of evolving circumstances, as perhaps it has in the instant case, that a party will plead an amount in controversy not exceeding $25,000 and yet litigate what is a "circuit court case"—one with a value exceeding $25,000—in the district court. Such a pleading would not then reflect the bona fide value of the case. Nonetheless, such a pleading is not necessarily one made in bad faith because the plaintiff may intend to litigate the "circuit court case" as a "district court case" by presenting only the arguments and evidence needed to demonstrate entitlement to the lower damages re-

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amount, and inferior courts of limited jurisdiction are limited in their jurisdiction to actions involving amounts between specified amounts.").

[9] See, e.g., 21 CJS, Courts, § 22, at 32 ("[T]he policy [of specifying a jurisdictional amount] is to force litigants whose disputes involve only comparatively trifling amounts to resort to inferior courts . . . .").

flected by the amount in controversy stated in the pleading.[10]

However, when a plaintiff pleads an amount in controversy with the *intention* to litigate a case inconsistent with that amount, the plaintiff has thwarted the Legislature's intention, and the pleading has been made in bad faith. In other words, while the plaintiff may have nominally pleaded a case within the district court's jurisdiction by alleging an amount in controversy not exceeding $25,000, he or she did so with the intention of litigating a "circuit court case" in the district court in contravention of the Legislature's intention that such a case belongs in the circuit court. A plaintiff does not, at least in my judgment, comply with § 8301(1) merely by pleading—and thus being willing to accept—an amount in controversy not exceeding $25,000; rather, to avoid a finding of bad faith, the plaintiff must plead with the intention to comply with the legal obligation to litigate that case in a manner consistent with the jurisdictional limit set by the Legislature. So when a plaintiff has a case with a value exceeding $25,000—that is, a "circuit court case"—and wishes to litigate in the district court by pleading an amount in controversy not exceeding $25,000, he or she may do so consistent with the Legislature's intentions only by litigating

[10] It is also possible that a plaintiff could file a case in the district court in the good-faith, but incorrect, belief that the case has a value not exceeding $25,000 and learn only *later* in the proceedings that the case, in fact, has a value exceeding $25,000. Such a plaintiff could not be said to have pleaded the amount in controversy in bad faith. Although the trial court is not ousted of jurisdiction in such circumstances, it *remains* responsible for enforcing its procedural and evidentiary rules, and for exercising its trial-management prerogatives, in a manner that ensures that any inconsistency between the amount in controversy pleaded and the actual value of the case does not prejudice or disadvantage the defendant.

the case *as though* it is valued at the pleaded amount, to wit, as a "district court case."

Pleading an amount in controversy in bad faith not only is incompatible with the Legislature's intention, but also is incompatible with the integrity of the judicial process, which requires the district court to exercise only the power "conferred upon it by" the Legislature. *Rabaut*, 389 Mich at 331. When a plaintiff pleads in good faith, a court can effectively police the boundaries of its jurisdiction simply by examining the face of the pleadings, but when a plaintiff pleads in bad faith, because the pleadings fall only *nominally* within the court's power, the court risks, through no fault of its own, exercising authority that the Legislature did not intend it to exercise. Such an exercise of power is incompatible with the integrity of our judicial process, and when it is a function of the plaintiff's own conduct in the pleadings, the court is justified in finding that he or she has pleaded in bad faith.[11]

As suggested above, litigating a "circuit court case" in the district court is incompatible with both the Legislature's intention and the integrity of the judicial process, and, consequently, a pleading intended to facilitate this as a litigation strategy is a pleading made in bad faith. That bad faith is further exemplified

[11] A court must continually question its jurisdiction at every "stage of the proceeding." *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939). The district court in particular must be vigilant in assessing its own jurisdiction because under some circumstances both parties may have an interest in litigating a "circuit court case" in the district court—the plaintiff's own decision would initiate the litigation in that venue, and the defendant might prefer the capped liability that results when a higher-value "circuit court case" is brought in the district court. Under such circumstances, the district court might be alone in upholding the integrity of the legislative and judicial processes. *Id*. ("Courts are bound to take notice of the limits of their authority . . . .").

by the sheer incompatibility of a "circuit court case," whose value exceeds $25,000, with the *capabilities* of the district court, which is designed for cases with values not exceeding $25,000. As a general proposition, it is reasonable to assume that the greater the amount of the claim, the more strenuously the parties will litigate, the more evidence will be placed before the jury, and the more numerous and complex will be the issues presented. By distinguishing the jurisdictions of the district court and the circuit court on the basis that the former generally hears cases with lesser amounts in controversy and the latter cases with greater amounts in controversy, the Legislature also presumably intended that the former generally hears cases of lesser complexity and the latter cases of greater complexity.[12]

This Court's own rules underscore the different levels of complexity inherent in typical "district court cases" and typical "circuit court cases." For example, the discovery rule permits discovery as a matter of course in "circuit court cases" while permitting it only with the court's leave or by the parties' stipulation in district court cases. See MCR 2.302(A)(2). The case-evaluation rule is another example of a rule distinguishing between the two types of cases; the rule authorizes the shortening of deadlines for hearings

[12] The Legislature also has directed to the district court criminal matters of relatively lesser complexity. See MCL 600.8311 (giving the district court jurisdiction over "[m]isdemeanors punishable by a fine or imprisonment not exceeding 1 year"; "[o]rdinance and charter violations punishable by a fine or imprisonment"; "[a]rraignments, the fixing of bail and the accepting of bonds"; certain "[p]robable cause conferences"; "[p]reliminary examinations"; and "[c]ircuit court arraignments"). The district court's civil and criminal jurisdictional statutes clearly indicate the Legislature's intention to direct toward that court relatively less complex, less consequential, and more straightforward cases and controversies.

and party briefs only in the district court. See MCR 2.403(A)(4). Such rules thus, in accordance with the Legislature's intention, treat "district court cases" and "circuit court cases" differently, investing the former, where the amounts of disputes are lower, with procedures designed for more expedited resolution.[13] Because of these and other differences in both court rules and statutes, as well as in the accumulated histories and experiences of the judges on these courts, the circuit court is the court best equipped to hear "circuit court cases," and the district court, though being best equipped to hear "district court cases," is correspondingly less well-equipped to hear "circuit court cases." Therefore, a pleading resulting in the litigation of a "circuit court case" in the district court is also less compatible with the district court's innate capabilities.

The district court's jurisdictional limit, and what this requires of a plaintiff, can be appreciated perhaps by considering the following hypothetical. A plaintiff wishes to bring a personal-injury claim of less than $25,000 based on an injury to a single arm. This "one-arm case" may be brought in the district court, and the plaintiff will be free to fully present arguments and evidence as to the full extent of the injury. By contrast, another plaintiff wishes to bring a personal-injury claim that exceeds $25,000 based on injuries to both arms and both legs. In order to recover the full measure of damages, this "four-limb case" must be brought in the circuit court, because that court alone can award relief in an amount exceeding $25,000. The question posed by the instant case is whether the

[13] That the district court is intended to hear relatively less complex matters is further evidenced by the fact that the court rules direct to the district court summary landlord-tenant proceedings, MCR 4.201 to MCR 4.202, and small-claims actions, MCR 4.301 to MCR 4.306.

four-limb case, if brought in the district court by pleading an amount in controversy of $25,000, must be dismissed for lack of subject-matter jurisdiction on the basis that such a pleading was clearly made in bad faith. The answer, as suggested by the analysis above, depends on what type of case the plaintiff intended, *when filing his or her pleading*, to litigate. If the plaintiff intended to present evidence of the full extent of his or her injuries—that is, if he or she intended to present the four-limb case—then he or she pleaded in bad faith because, despite having pleaded an amount in controversy not exceeding $25,000, he or she intended to litigate a "circuit court case" in the district court. In these circumstances, because the plaintiff's bad faith creates the risk that the district court will hear a "circuit court case," the district court must dismiss the case. A plaintiff intending to litigate the four-limb case in the district court may do so, but only by restricting himself or herself to the presentation of arguments and evidence consistent with the amount in controversy pleaded and not merely by demonstrating a willingness to accept damages not exceeding $25,000. Thus, the critical inquiry in assessing bad faith is whether the plaintiff clearly intended to litigate a case inconsistent with the amount in controversy pleaded.

However, whether the plaintiff intends to present a case consistent with the amount in controversy pleaded may be a difficult question because the plaintiff's intention to engage in litigation tactics illustrative of bad faith will not often be obvious from the face of the complaint. The trial court therefore must be attentive to assessing the presentation of arguments and evidence that may reasonably communicate that the plaintiff in reality has pursued a "circuit court

case" in the district court for the purpose of obtaining some litigation advantage.[14]

C. EVIDENCE OF BAD-FAITH PLEADING

A plaintiff acts in bad faith when he or she litigates a "circuit court case" in the district court for the purpose of obtaining some litigation advantage. The district court must be vigilant to such conduct, which, because it may suggest the plaintiff's intentions at the time of his or her pleadings, may constitute evidence of the plaintiff's pleading in bad faith. I offer an illustrative listing of circumstances that may support a finding of bad faith in the amount in controversy pleaded.

1. EXCESSIVE EVIDENCE

One way by which a plaintiff may achieve an unfair advantage by litigating a "circuit court case" in the district court is, despite having pleaded an amount in controversy not exceeding $25,000, by presenting evidence of injuries that *do* exceed $25,000. Such conduct places the defendant at a disadvantage because although liability is limited to $25,000, the defendant

[14] In the instant case, plaintiff alleged a "closed head injury," "pains in left shoulder, back, neck area, [and] lower back," and a "bruise on [the] left ankle," as well as "expenses for care, recovery, or rehabilitation," "loss of wages," "replacement services," and "attendant care." It is not clear from these allegations that plaintiff's claim had a value exceeding $25,000; nor is it clear that by filing the case she intended to litigate a "circuit court case" in the district court. But had the district court inquired into the issue of bad faith at the *pleadings*, it *may* nonetheless have concluded, similar to the court in *Fix*, that plaintiff clearly had no intention of litigating a case consistent with the amount in controversy pleaded. Such an inquiry *may* have revealed that plaintiff intended from the outset to litigate a "circuit court case" in the district court by presenting evidence of injuries exceeding $25,000. As in *Fix*, evidence of such an intention *might* show that the pleadings themselves were clearly made in bad faith and thus warrant dismissal.

will nonetheless be required to prepare a defense that is not similarly limited. In the instant case, for example, defendant first learned during discovery that plaintiff's injuries could be as high as $250,000. Even though plaintiff was willing to accept only $25,000 in damages, defendant had to be prepared to litigate a $250,000 case, i.e., a "circuit court case." A defendant facing a "circuit court case" must be prepared to defend against a "circuit court case," regardless of the venue in which that case is filed. This greater preparation may lead to higher legal costs, which may at some point come to be viewed as disproportionate to the liability created by the amount pleaded, and ultimately create undue pressures to settle, where no such pressures may have been created had the plaintiff litigated a bona fide "district court case."[15] By taking advantage of the jurisdictional rules, the plaintiff has shifted the defendant's settlement calculus from a traditional evaluation of case strengths and weaknesses to an evaluation of the benefits of litigating in the district court and of the expenditure of "circuit court case" legal costs.

2. ABSENCE OF DISCOVERY

Similar unfair advantage in arguing a "circuit court case" in the district court may be gained by the absence of mandatory discovery in the district court. As a general rule, "parties may obtain discovery by any

[15] I am cognizant that the backdrop of such a case will always be that a $25,000 maximum settlement may be significantly less than the defendant might have faced in the circuit court. However, once filed in the district court, a case becomes a "district court case," and a defendant should not have to settle on the basis of "circuit court case" considerations. More importantly, whatever the practical equities facing the two parties, the people of this state are entitled to have the laws of their representatives respected and the jurisdiction of their courts honored.

means provided in [MCR 2.301 *et seq*.]," but "in the district court, no discovery is permitted . . . except by leave of the court or on the stipulation of all parties." MCR 2.302(A)(1) and (2); see also *Ward v McNamara Community Hosp*, 426 Mich 855 (1986). This "major limitation[] on discovery," 1985 Staff Comment to MCR 2.302, is consistent with the Legislature's intention that the district court hear only cases whose values do not exceed $25,000, many of which may be straightforward enough to render discovery unnecessary. Moreover, in genuine "district court cases," the absence of discovery often enables parties to avoid the expenditure of time and resources more typically associated with "circuit court cases."

But where the plaintiff seeks to litigate a "circuit court case" in the district court, the absence of discovery could greatly hinder a defending party. When a plaintiff pleads an amount in controversy for the purpose of obtaining district court jurisdiction, yet is allowed to present argument and evidence significantly exceeding $25,000, the defendant could face a hardship because of an inability to learn more about the claim and to present a complete defense. In the absence of discovery, the plaintiff's settlement leverage described above is further magnified because the defendant must then weigh the potentially disproportionate costs of litigating a "circuit court case" against the financial exposure of a "district court case" and must do so without full knowledge of the plaintiff's claim. Thus, not only has the plaintiff gained an unfair advantage by our rules of jurisdiction, he or she has gained an unfair advantage by our rules of procedure. In the instant case, for example, it is possible that plaintiff may have withheld most of, if not all, the details of her injuries and their treatment, because the full extent of plaintiff's injuries—amounting to as

much as $250,000—came to light only during subsequent discovery. Yet in pleading an amount in controversy to obtain the jurisdiction of the district court, plaintiff may have been motivated at least in part by the possibility that there would be little or no discovery in that court. That such discovery ultimately occurred should not distract from an inquiry into *why* plaintiff, whose case had a potential value of $250,000, pleaded a "district court case" and then appeared to litigate a "circuit court case," for what matters is plaintiff's bad faith at the *pleadings*. Only an amount in controversy pleaded for the purpose of *litigating* a "circuit court case" in the district court ousts the district court of jurisdiction.

3. OFFER OF JUDGMENT

A plaintiff may further obtain an unfair advantage in arguing a "circuit court case" in the district court through the offer-of-judgment rule, MCR 2.405. Under that rule, one party (the offeror) may make a settlement offer, and if the other party (the offeree) rejects the offer, the offeree may be liable for the offeror's litigation costs unless the offeree improves his or her position at trial. The rule thereby "encourage[s] settlement and . . . deter[s] protracted litigation." *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995) (quotation marks and citation omitted). But an unfair advantage may also be gained because offers of judgment "are formulated by the parties themselves, creating the possibility that a party may make an offer not in a bona fide attempt to settle the case, but merely to create the possibility of securing an award of costs." *Freeman v Consumers Power Co*, 437 Mich 514, 519 n 8; 473 NW2d 63

(1991).[16] In particular, an unfair advantage may be gained when a plaintiff files an offer of judgment just below the jurisdictional maximum amount in controversy. The defendant, in choosing whether to accept or reject the offer, say an offer of $24,900, must then consider, not only its own costs of litigating to a verdict, but also the risks of having to pay the plaintiff's costs, for which the defendant will be liable unless it can improve on the $24,900 at trial. But because the plaintiff may be offering evidence in support of injuries well in excess of $25,000, and thereby litigating a "circuit court case" in the district court, the defendant, to achieve a more favorable result at trial, faces the task of having to convince the jury to discredit what may be a substantial amount of plaintiff's evidence in order to reduce the final award to an amount below $24,900. Thus, by submitting an offer of judgment just below the district court's jurisdictional maximum while litigating a "circuit court case," plaintiff may be able to gain an unfair advantage under the jurisdictional and procedural rules by recovering nearly the same amount (either $24,900 or $25,000) regardless of whether defendant accepts or rejects the offer of judgment.

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[16] The offer-of-judgment rule may be contrasted with the case-evaluation rule, MCR 2.403. The latter also seeks to shift fees to a party that refuses to accept an offered "case-evaluation award." But unlike an offer of judgment, which is formulated by the offering party itself and may not always reflect "a bona fide attempt to settle the case," a case-evaluation award is formulated "by three lawyers who are wholly uninvolved in the litigation" and thus not susceptible to a plaintiff's gamesmanship. *Freeman*, 437 Mich at 519 n 8. Case evaluation is prominent in the circuit court. See MCR 2.403(A)(2) ("Case evaluation of tort cases filed in circuit court is mandatory . . . ."); ICLE, Michigan Civil Procedure (April 2014), § 14.1, p 1034 ("Most cases in circuit court in which monetary relief is sought are submitted to case evaluation."). It is not, however, required in the district court. See MCR 2.403(A)(4).

4. JURY CONFUSION

Pleading a jurisdictional amount in bad faith in the district court may also entail interference with the jury function. The presentation of evidence of injury typical of a "circuit court case" may, as explained above, unfairly and *directly* disadvantage the defendant. It may also unfairly and *indirectly* disadvantage the defendant by skewing in plaintiff's favor a jury finding of liability, despite the fact that findings of injury and liability are distinct considerations. Professor Brian Bornstein, for example, asserted this result after presenting mock jurors with factual scenarios in which evidence of liability was held constant while evidence of the magnitude of injury varied. Bornstein concluded that fact-finders "will make different [liability] judgments depending upon the severity of the plaintiff[']s injury."[17] That is, the more abundant the evidence of injury presented, the more likely it is, *all else being equal*, that liability will be found. This is not only a matter of social-science evidence, but a matter that may be seen as affirmed by ordinary and commonsense understandings of human psychology: where two parties present evidence and seek damages for injuries done to a single arm, the party who is allowed to present evidence, *beyond the scope of the case*, that he or she also suffered injury to the other three limbs will tend to fare better between the two litigants. Evidence of the injuries to all four limbs might be relevant in a "circuit court case," but in the district court, evidence of injury beyond the one arm might be irrelevant and prejudicially excessive. Consequently, the plaintiff's

[17] Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28:16 J Applied Soc Psychol 1477, 1478, 1485 (1998).

advantaging himself or herself of such an effect might well suggest bad faith.[18]

5. JURY INFLUENCING

By litigating a "circuit court case" in the district court, the plaintiff may also take advantage of another cognitive bias, known as the "anchoring effect," that could affect the jury. According to Professor Daniel Kahneman, this "occurs when people consider a particular value for an unknown quantity before estimating that quantity."[19] He asserts that the anchoring effect influences decisions even if the "particular value" considered has nothing to do with the quantity to be estimated. In the context of a jury trial, the anchoring effect suggests that the jury's final award may sometimes be unduly affected by a large initial presentation of damages.[20] Accordingly, a jury may rely on a plaintiff's initial "anchoring value" to set the award's range and then reach a final award by "discounting."[21] Consider the case, for example, in which a plaintiff who has suffered injury to four limbs is allowed to sue in

[18] Defendant here challenged plaintiff's offering of "excessive" evidence of injury as "cumulative." The motion was opposed by plaintiff and denied by the trial court.

[19] Kahneman, *Thinking, Fast and Slow* (Farrar, Straus, and Giroux, 2011), p 119.

[20] See, e.g., Chopra*, The Psychology of Asking a Jury for a Damage Award*, Plaintiff Magazine, March 2013, p 7 ("Early research looking at the way jurors used anchoring in the context of jury damage awards suggested that the larger the lump sum request made by plaintiff's counsel, the larger the average award."); Sunstein et al, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, *Behavioral Law & Economics* (Sunstein ed) (Cambridge University Press, 2000), p 235 ("The amount demanded by the plaintiff also affected the size of the awards, most likely an anchoring effect, which influences the award directly . . . .").

[21] See Sunstein et al, *Assessing Punitive Damages*, p 243.

the district court, and the jury apprehends—perhaps from the presentation of the case or from its own inferences—that the value of the claim is $100,000. The jury may in the end decide to "discount" the claim by some amount, say 50%, on the basis that the testimony regarding pain and suffering was only partially credible, yielding a final award of $50,000. The court will reduce the $50,000 award to $25,000, in accordance with the plaintiff's pleading and the limits of its own jurisdiction. If, however, the plaintiff had been required to litigate the case in the district court as a "district court case," say one in which he or she had suffered injury only to one arm, the jury's 50% discount would have applied to a $25,000 claim, yielding a final post-discount award of $12,500. While a plaintiff may have no control over the discount a jury applies to the amount the plaintiff seeks to recover, by litigating a "circuit court case" in the district court, a plaintiff separates the value of the claim from the amount of damages sought and potentially facilitates a legal environment in which the anchoring bias inures to his or her advantage.

III. CONCLUSION

A party pleads in bad faith by setting forth an amount in controversy within the district court's jurisdiction while intending to litigate a "circuit court case" in the district court. See *Fix*, 83 Mich at 563. While bad-faith pleadings are rare, when they do occur, they undermine the law of our state and the integrity of our judicial process, and they give rise to conditions at trial in which a party may be unfairly prejudiced. In particular, because *each* of the parties may, under some circumstances, view litigating a "circuit court case" in the district court as being within the party's interest,

the district court is obligated to be vigilant in identifying bad-faith conduct, and it must be prepared to "question sua sponte its own jurisdiction" in order to preserve the aforementioned values. *Straus*, 459 Mich at 532. Such jurisdiction may be questioned "at any stage of the proceeding," and when the circumstances clearly demonstrate that jurisdiction has been obtained by a pleading in bad faith, the case must be dismissed. *Estate of Fraser*, 288 Mich at 394.

ROCK v CROCKER

Docket No. 150719. Argued January 13, 2016 (Calendar No. 1). Decided June 6, 2016.

Dustin Rock brought a medical malpractice action in the Kent Circuit Court against K. Thomas Crocker, D.O. (a board-certified orthopedic surgeon), and K. Thomas Crocker, D.O., PC (his professional corporation). Crocker had performed surgery on Rock's fractured ankle and also provided postsurgical care. Dr. David Viviano subsequently performed a second surgery on Rock's ankle, allegedly because Crocker's surgery had failed to unite all the pieces of the fracture. Rock alleged that Crocker had committed 10 negligent acts during the first surgery and over the course of his postsurgical care. Along with his complaint, Rock filed an affidavit of merit from Dr. Antoni Goral, a board-certified orthopedic surgeon who opined with respect to two of the allegations: that Crocker had breached the standard of care by not using enough screws or the proper length plate for the fracture and by prematurely allowing Rock to put weight on his leg. Goral later testified in a deposition, however, that these actions did not result in injury. Crocker then moved in limine to strike the two allegations and preclude Rock from presenting any evidence at trial regarding these alleged breaches of the standard of care. Rock acknowledged that Goral's statements failed to establish proximate cause but argued that the evidence was relevant to Crocker's expertise and competency to perform the surgery. The court, James R. Redford, J., agreed and denied Crocker's motion. The court concluded that the evidence was relevant to the issue of Crocker's general competency. The court also concluded that under MRE 403, the prejudice posed by the evidence did not substantially outweigh its probative value. During subsequent pretrial proceedings, plaintiff identified Viviano as a standard-of-care expert. Viviano had been a board-certified orthopedic surgeon when Crocker performed the surgery, but his certification had since expired and not been renewed. Crocker moved to exclude any standard-of-care testimony by Viviano, and the court granted the motion. Rock appealed by leave granted, and Crocker cross-appealed. The Court of Appeals, SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ., affirmed in part, reversed in part, and re-

manded for further proceedings, agreeing that while Rock could not seek damages for the two allegations that had been struck, the evidence underlying those allegations could be admitted at trial because it might be relevant to the jury's understanding of the case. Given the potential effect of that ruling on the MRE 403 analysis, the Court of Appeals remanded the case for reconsideration of the admissibility of the evidence. The Court of Appeals also ruled that Viviano could testify as an expert. 308 Mich App 155 (2014). The Supreme Court granted Crocker and his corporation's application for leave to appeal. 497 Mich 1034 (2015).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court *held*:

The board-certification requirement for an expert witness in a medical malpractice action is based on the expert's board-certification status at the time of the alleged malpractice rather than at the time of the testimony.

1. Under MRE 401 and MRE 402, evidence must be relevant to be admissible. The relevance contemplated by MRE 401 and MRE 402, however, is logical relevance. Even if logically relevant, evidence may still be excluded under MRE 404 because MRE 404 is a rule of legal relevance, limiting the use of evidence that is nonetheless logically relevant. MRE 404(b)(1) states that evidence of other acts is not admissible to prove a person's character in order to show that he or she acted in conformity with it, but the evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. Other-acts evidence is only admissible under MRE 404(b)(1) when a party shows that it is (1) offered for a proper purpose, i.e., to prove something other than the defendant's propensity to act in a certain way, (2) logically relevant, and (3) not unfairly prejudicial under MRE 403. Any undue prejudice that would arise because the evidence also unavoidably reflects the defendant's character must then be considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if the danger of unfair prejudice substantially outweighs the evidence's probative value. Without distinguishing logical relevance from legal relevance in this case, the Court of Appeals simply agreed with the trial court that the evidence in question might be relevant to the jury's understanding of the case and was relevant to Crocker's competency in treating Rock's injury and remanded the case for the trial court to conduct the MRE 403 balancing test. In doing so, it missed an essential step because it failed to first consider whether the evidence was legally

relevant under MRE 404(b). The proposed evidence passed the logical-relevance test of MRE 401 and 402 because it tended to demonstrate that Crocker had a propensity for negligence in treating Rock's injuries, albeit in incidents that were causally unrelated to plaintiff's injury. The evidence of Crocker's shortcomings in other acts over the course of the surgery and postsurgical care would tend to paint a picture of his general incompetence, making it appear more probable than not that he was negligent when providing the care that caused Rock's injury. However, this would not immediately require the application of MRE 403. Before applying MRE 403, the trial court should have considered whether the evidence was legally relevant and admissible under MRE 404(b) given that the evidence appeared to be intended to show that Crocker had a propensity to breach the standard of care when he treated Rock. This necessitated an inquiry into whether there was a proper purpose for admitting other-acts evidence. The trial court should have applied MRE 403 only if it found a proper purpose under MRE 404(b). Accordingly, it was necessary to vacate that portion of the Court of Appeals' judgment analyzing this issue to the extent that it concluded that evidence concerning the two alleged breaches of the standard of care that did not cause Rock's injury might be admissible and to remand for the trial court for it to perform the full MRE 404(b) analysis before engaging in an MRE 403 analysis to decide whether the evidence is admissible.

2. The Court of Appeals properly held that an expert testifying against a board-certified defendant must have been board-certified in the same specialty as the defendant at the time of the occurrence that is the basis for the action. MCL 600.2912a(1) requires a medical malpractice plaintiff to establish that the medical care provided by the defendant fell below the standard of medical care applicable at the time the care was provided. MCL 600.2169(1)(a) provides that a person may not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional, and if the party against whom or on whose behalf the testimony is offered "is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered." The statute further provides, however, that if the party against whom or on whose behalf the testimony is offered "is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." The question in this case was when the board certifications must match. The use of the present-tense forms "is" and "specializes" would generally mean that the

requirements relate to the present, which in this case would be the time of the testimony. However, the present-tense verb "specializes" relates to "the time of the occurrence" in the statute, which by definition would be an act that occurred in the past, that is, before the action was brought. In other words, the Legislature deviated from the general rules of grammar in MCL 600.2169(1)(a) by using the present tense when referring to an event that had already occurred. The board-certification requirement must be understood as an addition to the specialty requirement. Analyzing the plain language of the statute, contextual clues from the surrounding provisions, and the amendment history of the provision, it was clear that both the specialty and board-certification requirements apply at the time of the occurrence that was the basis for the claim or action.

Affirmed in part, vacated in part, and remanded for further proceedings.

NEGLIGENCE — MEDICAL MALPRACTICE — EXPERT WITNESSES — STANDARD OF CARE — BOARD CERTIFICATION OF EXPERT — TIME REQUIREMENTS.

MCL 600.2169(1)(a) provides that a person may not give expert testimony in a medical malpractice case concerning the appropriate standard of practice or care unless the person is licensed as a health professional; the statute further provides that the specialties and board certifications of the expert and the party against whom or on whose behalf the testimony is offered must match; both the specialty and board-certification requirements apply at the time of the occurrence that was the basis for the claim or action rather than at the time of the testimony.

Mark Granzotto, PC (by *Mark Granzotto*), and *Dib & Fagan, PC* (by *Albert J. Dib*), for Dustin Rock.

Collins Einhorn Farrell PC (by *Noreen L. Slank* and *Michael J. Cook*) and *Aardema Whitelaw, PLLC* (by *Brian W. Whitelaw*), for K. Thomas Crocker and K. Thomas Crocker, D.O., PC.

Amici Curiae:

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus*), for the University of Michigan Board of Regents.

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*), for the Michigan State Medical Society.

BERNSTEIN, J. This is a medical malpractice case involving (1) the admissibility of allegations of breaches of the standard of care that did not cause the plaintiff's injury and (2) the time at which a standard-of-care expert witness must meet the board-certification requirement in MCL 600.2169(1)(a). First, we vacate that portion of the Court of Appeals' judgment ruling on the admissibility of the allegations in this case and remand for the circuit court to determine whether the disputed evidence is admissible under MRE 404(b). Second, we affirm the Court of Appeals' conclusion that a proposed expert's board-certification qualification is based on the expert's board-certification status at the time of the alleged malpractice rather than at the time of the testimony.

I. FACTS AND PROCEDURAL HISTORY

In September 2008, plaintiff, Dustin Rock, fractured his right ankle while changing the brake pads on a truck. Defendant K. Thomas Crocker, D.O.,[1] a board-certified orthopedic surgeon, conducted surgery and provided postsurgical care. In October 2008, defendant allegedly told plaintiff that he could start bearing weight on his leg, though plaintiff did not start doing so at the time. In November 2008, another doctor, Dr. David Viviano,[2] performed a second surgery on plain-

[1] The other defendant in this case is Crocker's professional corporation, K. Thomas Crocker, D.O., P.C. For convenience we will use the singular term "defendant" to refer to Crocker individually and, as needed, Crocker and the corporation jointly.

[2] Dr. Viviano is not related to Justice VIVIANO.

tiff's ankle, purportedly because the surgery performed by defendant had failed to unite all the pieces of the fracture. At the time of the surgery performed by defendant, Viviano was a board-certified orthopedic surgeon.

In June 2010, plaintiff filed this lawsuit, alleging that defendant had committed 10 specific negligent acts during the first surgery and over the course of postsurgical care. Plaintiff asserted that he suffered additional medical expenses, as well as loss of earnings and earning capacity, because of defendant's negligence. Along with the complaint, plaintiff filed an affidavit of merit from Dr. Antoni Goral, a board-certified orthopedic surgeon who opined that defendant had breached the standard of care by (1) not using enough screws or the proper length plate for the fracture during the surgery[3] and (2) prematurely allowing plaintiff to put weight on his leg after the surgery. However, Goral later admitted in a November 2011 deposition that the length and the placement of the plate and the number of screws used did not cause any injury to plaintiff because the bone had healed correctly. Goral also admitted that telling plaintiff his leg could bear weight did not cause plaintiff's injuries.

As a result of these admissions, defendant moved in limine to strike these two allegations and preclude plaintiff from presenting any evidence at trial regarding these alleged breaches of the standard of care. In response, plaintiff acknowledged that Goral's statements failed to establish proximate causation, but

[3] Because the parties and the Court of Appeals characterized the alleged violations related to the length of the plate and the number of screws as a single allegation, we do the same and treat them together as one of the two alleged breaches of the standard of care involved in the first issue in this case.

argued that the evidence was relevant to defendant's expertise and competency to perform the surgery. The trial court agreed with plaintiff and denied defendant's motion. The trial court concluded that the evidence was part of the res gestae of the claim and was relevant to the issue of defendant's general competency. The trial court also concluded that the prejudice posed by this evidence did not substantially outweigh its probative value under MRE 403.

During pretrial proceedings, plaintiff also identified Viviano as a standard-of-care expert. Although Viviano had been board-certified at the time of the alleged malpractice in September and October 2008, his certification expired in December 2011. In September 2012, defendant moved to exclude any standard-of-care testimony by Viviano because his board certification had expired before he testified and had not been renewed. The trial court granted defendant's motion, concluding that MCL 600.2169(1)(a) was "clear on its face" that "the expert witness must 'be' a specialist who 'is' board certified in that specialty." *Rock v Crocker*, unpublished opinion and order of the Kent Circuit Court, issued September 27, 2012 (Case No. 10-06307-NM), p 3. Because Viviano's certification had since lapsed, the trial court concluded that he was not qualified to testify about the applicable standard of care. *Id*.

Plaintiff sought interlocutory leave to appeal, challenging the trial court's ruling that barred Viviano from testifying. The Court of Appeals granted leave, and defendant cross-appealed. Relevant to the issues before us, defendant challenged the trial court's order denying defendant's motion in limine to strike the two allegations of malpractice that Goral testified had not caused plaintiff's injury.

In a published opinion, the Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. *Rock v Crocker*, 308 Mich App 155; 863 NW2d 361 (2014). The Court noted that defendant's motion to strike the allegations actually comprised two separate motions: (1) a partial summary disposition motion because plaintiff may not seek damages for the two alleged breaches that did not cause the injury, and (2) a motion to exclude all evidence regarding the two allegations. *Id*. at 170. The Court agreed with defendant that plaintiff may not seek damages for those allegations. *Id*. Nonetheless, the Court of Appeals agreed with the trial court that the evidence underlying those allegations could be admitted at trial because it "may be relevant to the jury's understanding of the case." *Id*. However, given the finding that plaintiff could not seek damages for those alleged violations and the potential effect of that ruling on the MRE 403 analysis, the Court of Appeals remanded the case for reconsideration of the admissibility of the evidence.[4] *Id*. With regard to the expert's qualifications, the Court reversed the trial court's ruling that Viviano could not testify as an expert.

We granted leave to appeal and directed the parties to brief

> (1) whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence; and (2) whether the Court of Appeals erred in holding that, if the defendant is a board-certified special-

[4] The Court also rejected defendant's challenge to the trial court's grant of plaintiff's motion in limine, barring defendant from presenting evidence that plaintiff was receiving no-fault wage-loss benefits to show a motive to malinger. *Rock*, 308 Mich App at 171-174. Defendant does not raise this issue before us, and we will not review it.

> ist, MCL 600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial. [*Rock v Crocker*, 497 Mich 1034; 863 NW2d 330 (2015).]

II. ADMISSIBILITY OF THE EVIDENCE

Defendant contends that evidence of alleged breaches of the standard of care that did not cause plaintiff's injury is inadmissible. The admission of evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A trial court does not abuse its discretion when its decision falls within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "A court necessarily abuses its discretion when it 'admits evidence that is inadmissible as a matter of law.' " *Craig*, 471 Mich at 76 (citation omitted).

In a medical malpractice case, the plaintiff bears the burden of proving (1) the applicable standard of care, (2) a breach of that standard by the defendant, (3) an injury, and (4) proximate causation between the alleged breach of duty and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). MCL 600.2912a(2) specifically provides that "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." Therefore, drawing a causal connection between a defendant's breach of the applicable standard of care and a plaintiff's injuries is critical. See *Craig*, 471 Mich at 86.

With a general understanding of plaintiff's burden of proof, we turn to the Michigan Rules of Evidence to assess the admissibility of Goral's testimony regarding

the two breaches of the standard of care that did not cause the injury for which plaintiff now seeks compensation. To be admissible, evidence must be relevant. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevance contemplated in MRE 401 and MRE 402 is logical relevance. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993).[5] Even if logically relevant under MRE 401 and MRE 402, evidence may still be excluded under MRE 404 because MRE 404 "is a rule of legal relevance, defined as a rule limiting the use of evidence that is logically relevant." *Id*. at 61-62. Legal relevance, as a limiting rule, concerns the purpose for which evidence is used.[6] In particular, MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportu-

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[5] Although many of this Court's rulings concerning MRE 404 happen to be criminal cases, MRE 404 is applicable in civil cases as well as criminal cases. See *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003) (noting the 1991 amendment of MRE 404(b) to replace the phrase "the crime charged" with "the conduct at issue in the case"). See also *People v Jackson*, 498 Mich 246, 262 n 5; 869 NW2d 253 (2015) (noting that the phrase "conduct at issue" clarifies "that '[t]he rule applies in civil cases even though it is used more often in criminal cases' ") (citation omitted) (alteration in original). Accordingly, we consider criminal rulings regarding MRE 404(b) for guidance in applying the rule in the present civil case.

[6] See *Huddleston v United States*, 485 US 681, 687; 108 S Ct 1496; 99 L Ed 2d 771 (1988) ("Generally, [FRE 404 through 412] do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. [FRE] 404(b) [which is equivalent to MRE 404(b)], for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character.").

> nity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Therefore, evidence that is logically relevant under MRE 401 and MRE 402 may be excluded under MRE 404(b)(1) for lacking legal relevance if it does not have a proper purpose.[7]

Other-acts evidence is only admissible under MRE 404(b)(1) when a party shows that it is (1) offered for a proper purpose, i.e., to prove something other than the defendant's propensity to act in a certain way, (2) logically relevant, and (3) not unfairly prejudicial under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).[8] " '[I]f the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.' " *Jackson*, 498 Mich at 258, quoting *VanderVliet*, 444 Mich at 63. In *People v Mardlin*, this Court further explained:

> Evidence is *inadmissible* under [MRE 404(b)] *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaus-

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[7] We also note that courts have barred propensity evidence in the context of medical malpractice. See, e.g., *Wlosinski v Cohn*, 269 Mich App 303, 312; 713 NW2d 16 (2005) (opinion by O'CONNELL, P.J.) ("Propensity evidence is barred because it diverts a jury's attention from the facts of the case being tried and focuses it on the probability that the defendant, who has made so many mistakes before, made one again.").

[8] Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> tive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes. [*People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (citations omitted).]

Accordingly, while MRE 404(b) is an inclusionary rule, it is still subject to the balancing test under MRE 403.

Without distinguishing logical relevance from legal relevance, the Court of Appeals agreed with the trial court.[9] The Court simply concluded that the evidence in question "may be relevant to the jury's understanding of the case," *Rock*, 308 Mich App at 170, and is "relevant to [defendant's] competency in treating [plaintiff's] injury," *id*. at 170 n 8. The Court remanded the case to the trial court to conduct the MRE 403 balancing test. In doing so, the Court missed an essential step because it failed to first consider whether the evidence was legally relevant under MRE 404(b).

The proposed evidence passes the logical-relevance test under MRE 401 and 402 because it tends to demonstrate that defendant had a propensity for negligence in treating plaintiff's injuries, albeit in incidents

[9] The Court of Appeals did not explicitly reject the trial court's ruling that the proposed evidence might be admissible as part of the res gestae of the malpractice claim. We take this opportunity to highlight that this Court made it clear in *Jackson* that MRE 404(b)(1) does not have a res gestae exception. *Jackson*, 498 Mich at 274. Accordingly, there is no res gestae exception to be considered here.

that were causally unrelated to plaintiff's injury. The evidence of defendant's shortcomings in other acts over the course of the surgery and postsurgical care tends to paint a picture of defendant's general incompetence, making it appear more probable than not that defendant was negligent when providing the care that caused plaintiff's injury. However, this does not immediately call for the application of MRE 403. Before applying MRE 403, the trial court must consider whether the evidence was legally relevant and admissible under MRE 404(b) because the proposed evidence appears to be intended to show that defendant had a propensity to breach the standard of care when he treated plaintiff. This necessitates an inquiry into whether there was a proper purpose for admitting other-acts evidence as specified in the second sentence of MRE 404(b). Only if the trial court finds a proper purpose under MRE 404(b) should the trial court then apply MRE 403.

Accordingly, we vacate that portion of the Court of Appeals' judgment analyzing this issue to the extent it concluded that evidence concerning the two alleged breaches of the standard of care that did not cause plaintiff's injury may be admissible. We remand this case to the trial court for it to perform the full MRE 404(b) analysis before engaging in an MRE 403 analysis to decide whether the evidence is admissible.

III. BOARD-CERTIFICATION REQUIREMENT

Defendant argues that an expert witness must be board-certified at the time she or he testifies in order to be qualified under MCL 600.2169(1)(a) to testify.[10] The

[10] Defendant contends that "the time of trial" is the appropriate point of reference. Because MCL 600.2169 does not limit its application to in-trial testimony, however, we consider the issue in terms of "the time of the testimony" instead.

Court of Appeals rejected this argument, holding that "an expert . . . testifying against a board-certified defendant must have been board-certified in the same specialty as the defendant at the time of the occurrence that is the basis for the action." *Rock*, 308 Mich App at 161. We agree and affirm that ruling.

Questions of statutory interpretation are reviewed de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). A trial court's rulings concerning the qualifications of proposed expert witnesses are reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). A trial court does not abuse its discretion when its decision falls within the range of principled outcomes. *Maldonado*, 476 Mich at 388.

A medical malpractice plaintiff must establish that the medical care provided by the defendant fell below the standard of medical care applicable at the time the care was provided. MCL 600.2912a(1). A physician who testifies regarding the standard of care at issue must satisfy the requirements of MCL 600.2169(1), which provides:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person *is licensed as a health professional* in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, *specializes at the time of the occurrence that is the basis for the action* in the same specialty as the party against whom or on whose behalf the testimony is offered. *However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.*

> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony offered is licensed. [Emphasis added.]

Reading Subsection (1) and Subdivision (a) together evinces that there are up to three requirements for an expert witness giving testimony: a licensure requirement, a specialty requirement, and a board-certification requirement. With respect to the licensure requirement, the parties do not dispute that the expert must be licensed at the time of the testimony.

With respect to the specialty requirement, Subdivision (a) requires that the specialty of the proposed

expert witness match that of the party against whom or on whose behalf the testimony is offered. Subdivision (a) explicitly requires that this match occur "at the time of the occurrence that is the basis for the action." MCL 600.2169(1)(a). Subdivision (a) also makes it clear that the proposed expert witness must have the same board certification as the party against whom the testimony is offered. *Halloran*, 470 Mich at 574. The question is when the board certifications must match.

When construing statutory language, "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*. " '[W]ords in a statute should not be construed in the void, but should be read together to harmonize [their] meaning . . . .' " *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (citation omitted) (first alteration in original). On the basis of the plain language of the statute and contextual clues from the surrounding provisions, we conclude that both the specialty and board-certification requirements apply at the time of the occurrence that is the basis for the claim or action.

We start by examining the first sentence of Subdivision (a) of MCL 600.2169(1). We acknowledge that the general rules of grammar dictate that using the present-tense forms "is" and "specializes" means that the requirements relate to the present, which in this case would be the time of the testimony. However, in the first sentence of Subdivision (a), the present-tense verb "specializes" relates to "the time of the occurrence," which is by definition an act that occurred in the past, that is, before the action is brought. In other

words, the Legislature deviated from the general rules of grammar in MCL 600.2169(1)(a) by using the present tense when referring to an event that had already occurred.

The second sentence of Subdivision (a) of MCL 600.2169(1) begins with language that closely tracks that of the first sentence: "if the party against whom or on whose behalf the testimony is offered is a specialist." MCL 600.2169(1)(a). This suggests that the board-certification requirement mirrors the specialty requirement and should be understood as an addition to the specialty requirement.[11] Had the board-certification requirement been independent of and unrelated to the specialty requirement, there would have been no need to repeat some of this language, or to even put both requirements in the same subdivision.[12]

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[11] Construing the board-certification requirement as applying at the time of the occurrence is also consistent with *Woodard*. In *Woodard*, this Court commented on the requirement that the proposed expert witness be qualified to testify about what the relevant standard of care was when the alleged malpractice occurred:

> Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty. [*Woodward*, 476 Mich at 560.]

This suggests that the board-certification requirement also applies at the time of the alleged malpractice. Despite the fact that the central issue in *Woodard* did not involve the present issue, this Court's approach in *Woodard* lends support to our rejection of defendant's interpretation.

[12] Indeed, the Legislature could very well have chosen to put the board-certification requirement in MCL 600.2169(1) itself, along with

Additionally, it is noteworthy that the Legislature chose the word "however" to connect the two sentences of Subdivision (a) of MCL 600.2169(1). In *Halloran*, this Court focused on the use of that word. In its consideration of an expert witness who had never had the same board certification as the defendant, the Court emphasized the use of the word "however," which the Court defined as "in spite of that" and "on the other hand." *Halloran*, 470 Mich at 578, citing *Random House Webster's College Dictionary* (2d ed). The *Halloran* Court ultimately established that the board-certification requirement is an "*additional* requirement for expert witness testimony" that applies " 'in spite of' the specialty requirement . . . ." *Halloran*, 470 Mich at 578. This suggests that the board-certification requirement is complementary to, rather than independent from, the specialty requirement. *Halloran*'s reading of the word "however" thus supports reading the two sentences together so that both relate to the time of the occurrence that is the basis for the action.

Additional contextual clues support the interpretation that the board-certification requirement applies at the time of the occurrence. In examining the language of a statute, courts "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "Although a phrase or a statement may mean one thing when read in isolation, it may mean something

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the licensure requirement. However, that the specialty and board-certification requirements are both included in the same part of the statute—a subdivision that is separate from the part that contains the licensure requirement—is likely a reflection of the Legislature's recognition that a board certification is much more similar to a specialization than it is to licensure as a physician.

substantially different when read in context." *G C Timmis*, 468 Mich at 421.

MCL 600.2169(1)(b) looks backward in time by referring to "the year immediately preceding the date of the occurrence." MCL 600.2169(1)(c) likewise looks backward to "the year immediately preceding the date of the occurrence." Given that Subdivisions (b) and (c) and the first sentence of Subdivision (a) of MCL 600.2169(1) refer back to the time of the occurrence, it is unlikely that the Legislature meant to refer to the time of the testimony with respect to the board-certification requirement only. It is difficult to conclude that the first sentence of Subdivision (a) and the entirety of Subdivisions (b) and (c) refer to the time of the occurrence, but that the second sentence of Subdivision (a), without any clear indication to the contrary, relates not to the time of the occurrence but to the time of the testimony. Inserting a "time of the testimony" requirement in the midst of several "time of the occurrence" requirements would be an illogical departure. Accordingly, the context of the statutory language makes it clear that the board-certification requirement applies at the time of the occurrence.

Comparing the current version of MCL 600.2169(1)(a) and the version in effect before its 1993 amendment also supports this conclusion. While the preamendment version did not have a board-certification requirement, it provided in relevant part that a person was not qualified to give expert testimony unless that person "[s]pecializes, or specialized at the time of the occurrence which is the basis for the action, in the same specialty . . . as the specialist who is the defendant in the medical malpractice action"[13] When the Legislature amended MCL 600.2169(1)(a) in 1993,

[13] MCL 600.2169(1)(a), as added by 1986 PA 178.

it replaced this phrase with "specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered."[14] See *Rock*, 308 Mich App at 163-164. This switch to only the present tense further confirms the Legislature's intent to use the present tense to refer to a past occurrence. Had the Legislature intended to distinguish between the time of the occurrence and the time of the testimony within MCL 600.2169(1)(a), the first sentence would have employed the past tense "specialized" instead of the present tense "specializes" or "is a specialist," while the second sentence would have employed the present tense. But that is not what the Legislature did here.

Because it is obvious from the first sentence of MCL 600.2169(1)(a) that the present-tense word "specializes" relates to "the time of the occurrence," the Legislature was under no obligation to repeat the phrase "the time of the occurrence" in the second sentence. This Court explained that "the Legislature is not required to be overly repetitive in its choice of language." *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171 (2010). Thus, it was unnecessary for the Legislature to repeat the phrase "the time of the occurrence" in every instance given that the context of MCL 600.2169(1)(a), (b), and (c) makes it clear that the time of the occurrence is the relevant point in time. To add the phrase "at the time of the occurrence that is the basis for the action" in every applicable instance would have created an unduly cumbersome statute.

Our interpretation of MCL 600.2169(1)(a) avoids the problems presented by situations in which an expert witness's qualifications could not be ascertained until

[14] MCL 600.2169(1)(a), as amended by 1993 PA 78.

the date of the testimony. It is also consistent with the established relationship between MCL 600.2912d(1) and MCL 600.2169. "[U]nder MCL 600.2912d(1), a plaintiff is required to file with the complaint an affidavit of merit signed by *an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169*." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (some emphasis added). Requiring the board-certification requirement to apply at the time of the occurrence allows a plaintiff to ensure that an expert is qualified well in advance of the time of the testimony.[15]

Accordingly, we affirm the judgment of the Court of Appeals on this issue and hold that the board-certification requirement applies at the time of the occurrence that is the basis for the action, not the time of testimony.

IV. CONCLUSION

We hold that the lower courts erred by concluding that the evidence of alleged violations of the standard of care that did not cause plaintiff's injury may be admissible without first applying the appropriate evaluation under MRE 404(b). We also hold that the board-certification requirement relates to the time of the alleged malpractice rather than the time that testimony is taken, given how the statute is structured and how the present tense is used in a nonstandard way in the specialty requirement. Therefore, we affirm the judgment of the Court of Appeals in part, vacate it

[15] In addition, this interpretation prevents gamesmanship, such as a defendant-physician becoming board-certified shortly before trial and disqualifying an expert witness who is not board-certified, thereby depriving the plaintiff of his or her chosen expert.

in part, and remand the case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

PIRGU v UNITED SERVICES AUTOMOBILE ASSOCIATION

Docket No. 150834. Argued on application for leave to appeal January 14, 2016. Decided June 6, 2016.

Feridon Pirgu sustained closed head injuries after he was struck by a vehicle driven by an individual insured by defendant, United Services Automobile Association. Plaintiff, Feridon's wife Lindita, was appointed as Feridon's guardian and conservator. Plaintiff filed a complaint against defendant in the Oakland Circuit Court after defendant discontinued payment of personal protection insurance (PIP) benefits previously provided for Feridon's care. Plaintiff sought a judgment of $200,000 to $400,000 and the reinstatement of benefits. The jury awarded plaintiff $70,237.44. Plaintiff requested attorney fees totaling $220,945. Plaintiff's counsel claimed that he spent more than 600 hours prosecuting the case and that his normal billing rate was $350 an hour. The trial court, John J. McDonald, J., concluded that plaintiff was due attorney fees because defendant's failure to pay the PIP benefits was unreasonable. The trial court noted that the jury awarded plaintiff approximately 33% of the amount plaintiff sought, and thus the court awarded plaintiff $23,412.48 in attorney fees, approximately 33% of the jury verdict. Plaintiff appealed in the Court of Appeals. The Court of Appeals, BECKERING, P.J., and HOEKSTRA, J. (GLEICHER, J., dissenting), affirmed the trial court in an unpublished opinion per curiam issued December 16, 2014 (Docket No. 314523). The Supreme Court scheduled oral argument on plaintiff's application for leave to appeal and, in lieu of granting leave, reversed the trial court's judgment, vacated the trial court's award of attorney fees, and remanded the matter to the trial court for reconsideration.

In a unanimous opinion by Justice VIVIANO, the Supreme Court *held*:

A trial court must begin its calculation of a reasonable attorney fee under MCL 500.3148(1) by multiplying the reasonable hourly rate customarily charged in the locality for similar legal services by the reasonable number of hours expended on the case. Thereafter, a trial court must consider the following eight factors to determine whether an up or down adjustment to that

baseline number is appropriate: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent. These factors are not exclusive, and the trial court may consider additional relevant factors. To facilitate appellate review, a trial court should briefly discuss its view of each of the factors on the record and justify the relevance and use of any additional factors.

The trial court abused its discretion by failing to apply this framework, and the Court of Appeals majority erred to the extent that it affirmed the trial court's attorney fee award.

Reversed, trial court fee award vacated, and case remanded to the trial court for reconsideration.

ATTORNEY FEES — CALCULATING A REASONABLE FEE — FACTORS TO CONSIDER.

A trial court must apply the following framework in determining a reasonable attorney fee in cases involving MCL 500.3148(1) of the no-fault insurance act; first, the court must calculate a baseline amount of attorney fees by multiplying the reasonable hourly rate customarily charged in the locality for similar legal services by the reasonable number of hours expended on the case; then, the court must decide whether an upward or downward adjustment to the baseline number is appropriate by evaluating the baseline number in light of the following eight factors: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent; these factors are not exclusive, and the trial court may consider additional relevant factors; to facilitate appellate review, a trial

court should briefly discuss its view of each of the factors on the record and justify the relevance and use of any additional factors.

Richard E. Shaw and *Law Office of Richard M. Shulman* (by *Richard M. Shulman*) for plaintiff.

Schwartz Law Firm, PC (by *Susan Leigh Brown*), for defendant.

VIVIANO, J. The issue in this case is whether the framework for calculating a reasonable attorney fee set forth in *Smith v Khouri*[1] applies to attorney fee determinations under MCL 500.3148(1) of the no-fault insurance act.[2] The Court of Appeals' majority affirmed the trial court's calculation of the attorney fee award, concluding that the *Smith* framework does not apply to attorney fee determinations under § 3148(1). We disagree with this conclusion and instead hold that the *Smith* framework—as described in Justice CORRIGAN's concurring opinion and as modified herein—applies to attorney fee determinations under § 3148(1).[3] Therefore, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the fee award, and remand to the trial court for reconsideration of its attorney fee award in light of this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 2008, Feridon Pirgu sustained closed head injuries after he was struck by a car driven by an insured of defendant, United Services Automobile Association. Plaintiff, Feridon's wife Lindita, was appointed as his guardian and conservator. Shortly thereafter, plaintiff sought various personal protection insurance (PIP)

[1] *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

[2] MCL 500.3101 *et seq*.

[3] *Smith*, 481 Mich at 538-543 (opinion by CORRIGAN, J.).

benefits for Feridon. Because Feridon was uninsured, the claim was initially assigned to the Michigan Assigned Claims Facility, which then assigned the claim to Citizens Insurance Company. Following a priority dispute between Citizens and defendant, defendant was determined to have first priority for payment of PIP benefits. Defendant began adjusting the claim in 2010 and immediately discontinued payment of the benefits.

Plaintiff filed suit against defendant for reinstatement of the discontinued benefits and for attorney fees, seeking a judgment in the amount of $200,000 to $400,000.[4] Following trial, the jury awarded plaintiff $70,237.44.[5] Thereafter, plaintiff's counsel sought $220,945 in attorney fees, claiming that he had expended more than 600 hours prosecuting the case and that his normal billing rate was $350 per hour. Because the trial court concluded that defendant's failure to pay the PIP benefits was unreasonable, it found that attorney fees were warranted under § 3148(1).[6] The trial court noted that the jury awarded plaintiff approximately 33% of the judgment amount sought, and therefore the trial court awarded $23,412.48 in attorney fees, approximately 33% of the jury verdict.

The Court of Appeals affirmed in a split, unpublished opinion.[7] The majority concluded that it was bound to follow *University Rehab Alliance, Inc v Farm*

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[4] The variance in the amounts is accounted for by the two different hourly rates for attendant care that plaintiff's counsel offered to the jury in his closing argument.

[5] The jury awarded $54,720 for attendant-care benefits, $7,992 in wage-loss benefits, and $7,525.44 in penalty interest.

[6] Defendant has not challenged this ruling.

[7] *Pirgu v United States Auto Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2014 (Docket No. 314523). We

Bureau Gen Ins Co of Mich,[8] which held that the *Smith* framework does not apply to reasonable attorney fee awards under § 3148(1).[9] Applying *University Rehab*'s totality of the circumstances analysis, the Court of Appeals majority concluded that the trial court's award was reasonable. The majority gave the following justifications: (1) the results achieved were considerably less than the amount sought, (2) the fee award was commensurate with what plaintiff's counsel would have received under a contingency fee arrangement, and (3) the trial court expressly found that not all of the hours plaintiff's counsel expended were necessary.[10]

Dissenting in part, Judge GLEICHER would have held that the trial court abused its discretion by neglecting to consider the number of hours plaintiff's counsel invested in the case and his appropriate hourly rate.[11] The dissent also opined that no-fault cases require a court either to fully apply the factors detailed by this Court in *Wood v Detroit Auto Inter-Ins Exch*[12] or to fully apply the *Smith* framework.[13] The dissent also criticized the trial court for only considering the amount in question and the results achieved.[14]

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note that the Court of Appeals incorrectly identified defendant as the United *States* Automobile Association.

[8] *University Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008).

[9] *Pirgu*, unpub op at 3-4.

[10] *Id*. at 5.

[11] *Id*. at 4 (GLEICHER, J., concurring in part and dissenting in part).

[12] *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).

[13] *Pirgu*, unpub op at 7 (GLEICHER, J., concurring in part and dissenting in part).

[14] *Id*. at 6-7.

This Court scheduled oral argument on the application, directing the parties to address whether reasonable attorney fee determinations under § 3148(1) are governed by *Wood* and/or *Smith* and whether the trial court abused its discretion in calculating the attorney fees due to plaintiff.[15]

II. STANDARD OF REVIEW

We review a trial court's award of attorney fees and costs for an abuse of discretion.[16] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[17] A trial court necessarily abuses its discretion when it makes an error of law.[18] Questions of law are reviewed de novo.[19]

III. ANALYSIS

At issue in this case is the proper method for calculating a reasonable attorney fee under MCL 500.3148(1), which provides that:

> An attorney is entitled to a reasonable fee . . . in an action for personal or property insurance benefits which are overdue . . . if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The statute is an exception to the "American rule," which provides that "attorney fees generally are not

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[15] *Pirgu v United Servs Auto Ass'n*, 498 Mich 860 (2015).

[16] *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[17] *Id*.

[18] *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

[19] *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award."[20]

At the outset, it is helpful to understand the current state of the law regarding the determination of a reasonable attorney fee. In *Wood*, which also involved an attorney fee award under § 3148(1), we enumerated the following factors for determining the reasonableness of an attorney fee:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[21]

We held that a trial court should consider the factors outlined in *Wood*, but that it is not limited to them in making its determination.[22]

In *Smith*, we reviewed a reasonable attorney fee award as part of case-evaluation sanctions under MCR 2.403(O) and revisited *Wood*'s multifactor approach.[23] We held that a trial court must begin its reasonableness analysis "by determining the fee customarily charged in the locality for similar legal services" and then multiplying that number "by the reasonable number of hours expended in the case."[24] After a trial court has calculated this baseline figure, it must consider and briefly discuss on the record the remain-

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[20] *Haliw v City of Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005).

[21] *Wood*, 413 Mich at 588 (quotation marks and citations omitted).

[22] *Id*.

[23] *Smith*, 481 Mich at 527-529 (opinion by TAYLOR, C.J.).

[24] *Id*. at 530-531.

ing *Wood* factors and the factors in MRPC 1.5(a)[25] to determine whether any up or down adjustments from the base number are appropriate.[26]

There was a split in *Smith*, however, regarding whether two factors, "the amount in question and the results achieved" (factor 3 under *Wood* and factor 4 under MRPC 1.5(a)), and "whether the fee is fixed or contingent" (factor 8 under MRPC 1.5(a)), should be considered when determining a reasonable attorney fee for case-evaluation sanctions. The lead opinion concluded that the two factors are not relevant.[27] Justice CORRIGAN, joined by Justice MARKMAN, concurred with the reasoning and result of the lead opinion, but argued that there was no principled basis

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[25] The MRPC 1.5(a) factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

[26] *Smith*, 481 Mich at 531, 533 (opinion by TAYLOR, C.J.).

[27] *Id*. at 534 n 20.

or textual support for excluding the two factors from consideration.[28]

Subsequently, in *University Rehab*, the Court of Appeals relied on our decision in *Wood*, and on the MRPC 1.5(a) factors, to uphold a reasonable attorney fee award made under § 3148(1).[29] Pertinent to this case, the Court of Appeals held that our decision in *Smith* did not affect its analysis, stating:

> First, *Smith* addressed MCR 2.403(O)(6)(b), which explicitly requires that the reasonable-attorney-fee portion of actual costs be based on a reasonable hourly or daily rate as determined by the trial court. Second, while two justices would have held that whether an attorney has a contingent-fee agreement with a client is not an appropriate factor when considering a reasonable attorney fee as a case-evaluation sanction, that part of the opinion is not binding precedent because a majority of justices did not agree.[30]

Although the *University Rehab* panel applied a combination of the *Wood* and MRPC 1.5(a) factors in a manner that is similar to the *Smith* concurrence's approach, it did not require the trial court to begin its analysis by making the baseline calculation pursuant to *Smith* and instead adopted a totality of the circumstances approach.[31]

As noted, the Court of Appeals majority in this case followed *University Rehab* to conclude that the *Smith* framework does not apply to reasonable attorney fee determinations under § 3148(1). We disagree with this conclusion. Instead, we conclude that the *Smith* framework applies in this context.

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[28] *Id*. at 538 (opinion by CORRIGAN, J.).

[29] *University Rehab*, 279 Mich App at 698-704.

[30] *Id*. at 700 n 3 (citations omitted).

[31] *Id*. at 700.

In *Smith*, we refined the analysis that applies when a fee-shifting statute or rule requires a trial court to determine a reasonable attorney fee.[32] We have held that the *Smith* framework applies beyond the case-evaluation sanctions context in appropriate circumstances.[33] Of course, whether it applies in a given case must depend on the plain language of the statute or rule at issue.[34] As we often note, any statutory construction must begin with the plain language.[35] "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used."[36] These same principles govern the interpretation of court rules.[37]

Smith considered a fee award under MCR 2.403(O)(6)(b), which provides for "a reasonable attor-

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[32] See *Smith*, 481 Mich at 535 (opinion by TAYLOR, C.J.) ("We merely aim to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes.").

[33] In *Coblentz v City of Novi*, 485 Mich 961 (2009), we considered an award of reasonable attorney fees under the Freedom of Information Act. At the time, MCL 15.240(6) provided that "[i]f a person . . . prevails in an action commenced under this section, the court shall award reasonable attorneys' fees . . . ." In determining the reasonable attorney fees due to the plaintiffs, the trial court considered whether the city's conduct was corrupt enough to justify fees and whether the fees would bankrupt the city or burden the public welfare. *Coblentz*, 485 Mich 961. We held that "[n]othing in MCL 15.240(6), or decisions of this Court, authorizes consideration of such factors in determining a reasonable attorney fee award." *Coblentz*, 485 Mich 961. Accordingly, we reversed and remanded for a re-determination of the plaintiffs' reasonable attorney fees using the *Smith* factors.

[34] The answer to Justice CAVANAGH's question of whether the rule applies to other fee-shifting provisions, *Smith*, 481 Mich at 554-555 (CAVANAGH, J., dissenting), must be determined by examining the plain language of the rule or statute at issue in a given case.

[35] *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

[36] *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012).

[37] *Duncan*, 494 Mich at 723.

ney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation . . . ." Section 3148(1) contains slightly different language, providing that "[a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for [overdue PIP benefits]."

Although § 3148(1) is phrased differently than MCR 2.403(O)(6)(b), those differences are not material to determining whether the *Smith* framework applies. The plain language of the statute and the court rule both speak in terms of a reasonable fee.[38] The operative language triggering the *Smith* analysis is the Legislature's instruction that an attorney is entitled to *a reasonable fee*. The *University Rehab* panel erred by disregarding this language in § 3148(1) when it concluded that *Smith* was distinguishable because it only applies to case-evaluation sanctions.[39] Because the plain language of § 3148(1) speaks in terms of awarding a "reasonable fee," we conclude that the *Smith* framework governing reasonable fee determinations is equally applicable in this context.

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[38] We agree with Justice CORRIGAN's statement in *Smith* that the plain language of MCR 2.403(O)(6)(b) "merely requires that the court award a 'reasonable attorney fee'; it does not suggest that 'reasonable attorney fee' means something different for case evaluation sanctions than for any other situation." *Smith*, 481 Mich at 539 (opinion by CORRIGAN, J.).

[39] *University Rehab*, 279 Mich App at 700 n 3. The *University Rehab* panel also disregarded *Smith*'s repeated use of language of general applicability, which clearly contemplated that the methodology announced therein could be applicable to reasonable attorney fee determinations outside the case-evaluation context. See e.g., *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.) ("We take this opportunity to clarify that the trial court should begin the process of calculating *a reasonable attorney fee* . . . .") (emphasis added); *id*. at 530 ("We conclude that our current multifactor approach needs some fine-tuning."); *id*. at 533 ("Having clarified how a trial court should go forward in calculating *a reasonable attorney fee* . . . .") (emphasis added).

Despite reaching the wrong conclusion, *University Rehab* properly recognized the nonbinding nature of the lead opinion's conclusion in *Smith* that two of the factors—"the amount in question and the results achieved" and "whether the fee is fixed or contingent"—are not relevant in the case-evaluation context.[40] While we do not decide today whether those factors should be considered in that context, we hold that they must be considered by a trial court when awarding attorney fees under § 3148(1).[41] We have long recognized that the results obtained are relevant to determining the reasonable value of legal services.[42] The results obtained are indicative of the exercise of skill and judgment on the part of the attorney.[43] Similarly, the nature of the fee arrangement is also a relevant factor because a contingency fee percentage may "express an attorney's expectations of the case and the risks involved."[44] Accordingly, a trial court must consider both of these factors when making adjustments to the baseline fee award.

Thus, while we agree with portions of *University Rehab*, we disagree with that Court's conclusion that

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[40] *University Rehab*, 279 Mich App at 700 n 3, citing *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998) ("[A] majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases.") (quotation marks and citation omitted).

[41] This is in accord with the lead opinion in *Smith*, since it recognized that both factors "may be relevant in other situations." *Smith*, 481 Mich at 534 n 20 (opinion by TAYLOR, C.J.). See also *Beach v Kelly Auto Group, Inc*, 482 Mich 1101, 1102 (2008) (YOUNG, J., concurring). And, in any event, the parties have offered no justification for excluding these factors when awarding attorney fees under § 3148(1).

[42] See *Becht v Miller*, 279 Mich 629, 640; 273 NW 294 (1937) ("In ascertaining the reasonable value of legal services, the court should consider . . . the results obtained.").

[43] *Fry v Montague*, 242 Mich 391, 393-394; 218 NW 691 (1928).

[44] *Smith*, 481 Mich at 540 (opinion by CORRIGAN, J.).

Smith is inapplicable to reasonable attorney fee determinations under § 3148(1). In particular, the *University Rehab* panel erred by failing to begin its analysis by calculating the baseline figure pursuant to *Smith*. Therefore, we take this opportunity to overrule *University Rehab* to the extent that it is inconsistent with our opinion today. Having done so, we conclude that the Court of Appeals erred by holding that the *Smith* framework does not apply to reasonable attorney fee determinations under § 3148(1).

In sum, we hold that when determining the reasonableness of attorney fees awarded under § 3148(1), a trial court must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services.[45] The trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure.[46] Thereafter, the trial court must consider *all* of the remaining *Wood* and MRPC 1.5(a) factors to determine whether an up or down adjustment is appropriate.[47]

Unfortunately, *Smith* requires trial courts to consult two different lists of factors containing significant overlap, which unnecessarily complicates the analysis and increases the risk that courts may engage in incomplete or duplicative consideration of the enumerated factors. Therefore, we distill the remaining *Wood* and MRPC 1.5(a) factors into one list to assist trial courts in this endeavor:

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[45] *Id*. at 530-531 (opinion by TAYLOR, C.J.). We emphasize that the burden of proving reasonableness rests with the party requesting the fees. *Id*. at 528-529. With respect to the reasonable hourly rate, "the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality." *Id*. at 532. "The fees customarily charged . . . can be established by testimony or empirical data found in surveys and other reliable reports." *Id*. at 531-532.

[46] *Id*. at 531.

[47] *Id*.

(1) the experience, reputation, and ability of the lawyer or lawyers performing the services,

(2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,

(3) the amount in question and the results obtained,

(4) the expenses incurred,

(5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent.

These factors are not exclusive, and the trial court may consider any additional relevant factors.[48] In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.[49]

IV. APPLICATION

Having clarified the proper framework that applies to reasonable fee awards under § 3148(1), we turn to the award in the instant case. The trial court erred by not starting its analysis by multiplying a reasonable hourly rate by the reasonable number of hours expended. Further, although it acknowledged some of the *Wood* and MRPC 1.5(a) factors, the trial court also erred by primarily relying on only one factor—the

[48] *Id*. at 530.

[49] *Id*. at 529 n 14, 531, 531 n 15.

amount sought and results achieved—and failing to briefly discuss its view of the other factors. Therefore, the trial court necessarily abused its discretion, and as a result, the Court of Appeals erred by affirming the trial court's attorney fee award. Accordingly, we reverse the judgment of the Court of Appeals, vacate the fee award, and remand to the trial court for reconsideration in light of this opinion.[50]

V. CONCLUSION

We hold that when calculating a reasonable attorney fee award under § 3148(1), a trial court must follow the *Smith* framework, as outlined by Justice CORRIGAN's concurring opinion and as modified by this opinion. The trial court abused its discretion by failing to do so, and the Court of Appeals majority erred to the extent that it affirmed the trial court's attorney fee award. Therefore, the judgment of the Court of Appeals is reversed, the fee award is vacated, and the case is remanded to the trial court for reconsideration in light of this opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

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[50] Defendant argues that plaintiff entirely failed to meet her burden of proof to support her claim for attorney fees. See *Smith*, 481 Mich at 528-529 (opinion by TAYLOR, C.J.). Because the trial court failed to properly apply *Smith*, it is unclear whether plaintiff met her burden. Accordingly, the trial court should consider this issue on remand when it applies the *Smith* framework.

ALTOBELLI v HARTMANN

Docket No. 150656. Argued on application for leave to appeal March 9, 2016. Decided June 13, 2016.

Dean Altobelli filed a complaint in the Ingham Circuit Court against seven individual principals of the law firm of Miller, Canfield, Paddock and Stone, PLC (the Firm)—five managing directors, the Firm's CEO, and the head of the Firm's litigation group. Altobelli did not name the Firm as a defendant. Altobelli himself was a senior principal of the Firm at the time the events from which this lawsuit arose took place. All principals of the Firm were required to sign an operating agreement that contained information concerning principals' rights and obligations and the administration of the Firm's business. The operating agreement also contained an arbitration clause that mandated arbitration of "any dispute . . . between the Firm . . . and any current or former Principal[.]" In 2010, Altobelli informed two of the defendants—the Firm's CEO, and the head of the Firm's litigation group—that he wished to take a leave of absence from the Firm so that he could pursue an opportunity to join the coaching staff of the University of Alabama football team. Altobelli suggested that the Firm allow him to maintain his ownership interest in the Firm and to return to the Firm as a senior principal any time before June 1, 2011. Although Altobelli claimed he was initially promised he could take the job in Alabama and still receive certain allocated funds from his clients, defendants claimed that Altobelli knew that the individual making that alleged promise had no authority to make a formal commitment to Altobelli. Believing that Altobelli had accepted the position at the University of Alabama, the CEO and the managing directors concluded that Altobelli had voluntarily withdrawn from the Firm. Altobelli argued that he did not voluntarily withdraw, but that he was improperly terminated. Altobelli's attempt to resolve the matter through the direct settlement and mediation process, as outlined in the arbitration clause of the operating agreement, was unsuccessful. In November 2011, Altobelli filed a demand for arbitration as provided for in the arbitration clause. Despite having made the demand for arbitration, Altobelli filed the instant lawsuit alleging that the seven

individuals named as defendants were responsible for engaging in tortious conduct with regard to Altobelli's request for a leave of absence and retention of his equity ownership in the Firm. Defendants filed a motion for summary disposition and a motion to compel arbitration as required by the arbitration clause. Altobelli filed a motion for partial summary disposition. The circuit court, Paula J. Manderfield, J., denied defendants' motions and granted Altobelli's motion for partial summary disposition, finding as a matter of law that Altobelli did not voluntarily withdraw from the Firm. Rather, the circuit court concluded that defendants had improperly terminated Altobelli's ownership interest without authority. Defendants appealed in the Court of Appeals. The Court of Appeals, BORRELLO, P.J., and SERVITTO and BECKERING, JJ., affirmed the circuit court's denial of defendants' motion to compel arbitration and reversed the circuit court's order granting partial summary disposition to Altobelli. 307 Mich App 612 (2014). The Court of Appeals determined that the central question was whether Altobelli could sue the Firm's managing directors, CEO, and head of the litigation group in their individual capacities or whether the arbitration clause required arbitration of the dispute. The Court of Appeals decided that the arbitration clause only required the arbitration of disputes between the Firm and a current or former principal, not disputes between a former principal and individually named defendants. The Court of Appeals concluded that there existed a question of fact about whether Altobelli voluntarily withdrew from the Firm. Defendants appealed, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 498 Mich 912 (2015).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court *held*:

The operating agreement's mandatory arbitration clause is not limited to disputes between the Firm and current or former principals of the Firm. The clause also applies to a dispute between a former principal and individually named principals of the Firm acting as agents of the Firm. Because the operating agreement's arbitration clause applies to this case, the lower courts erred by reaching the substantive content of Altobelli's motion for partial summary disposition. The arbitrators chosen according to the procedure outlined in the arbitration clause are responsible for resolving the issues raised in Altobelli's motion.

1. A court reviewing the disposition of a party's motion to compel arbitration must avoid analyzing the substantive merits of the dispute; if the dispute is arbitrable, the merits are to be

analyzed by the arbitrator(s). In this case, the lower courts should not have reached the issues raised in Altobelli's motion for partial summary disposition because the arbitration clause mandated binding arbitration for disputes arising between a current or former principal of the Firm and the Firm, which includes individual principals of the Firm acting as agents of the Firm.

2. In interpreting an arbitration clause, the agency principles that apply to corporations also apply to professional limited liability companies. The operation of a professional limited liability company depends on the actions of its employees who have been given the authority to act as the company's agents. The actions of these employees, when the employees are operating on behalf of the company, are the acts of the company. Because a company cannot act on its own, an arbitration clause that includes a company as a party to arbitration must also include those employees that act as agents of the company.

3. An arbitration clause intended to cover any dispute between a current or former principal and a company is broad in scope but applies only when the subject matter of the dispute involves actions taken by a principal acting on behalf of the company. In this case, Altobelli alleges numerous occasions on which one or more of the defendants deprived Altobelli of his rights under the operating agreement. All of Altobelli's allegations reflect decisions made by defendants in their capacities as the Firm's agents, as authorized by the operating agreement and agency principles.

Reversed in part and vacated in part; application for leave to appeal as cross-appellant denied as moot.

1. PROFESSIONAL LIMITED LIABILITY COMPANIES — OPERATING AGREEMENTS — ARBITRATION — MERITS OF DISPUTE.

When a dispute is arbitrable, analysis of the merits of the dispute is reserved for the arbitrator, not a court.

2. PROFESSIONAL LIMITED LIABILITY COMPANIES — AGENCIES.

In interpreting an arbitration clause, the same agency principles that apply to corporations also apply to professional limited liability companies.

3. PROFESSIONAL LIMITED LIABILITY COMPANIES — OPERATING AGREEMENTS — ARBITRATION — INDIVIDUALLY NAMED DEFENDANTS.

Binding arbitration mandated by a company's operating agreement applies to individually named employees of the company acting under the authority delegated to them by the operating

agreement; because a company acts through its employees, arbitration must apply to those individual employees acting on behalf of the company.

4. PROFESSIONAL LIMITED LIABILITY COMPANIES — OPERATING AGREEMENTS — ARBITRATION — SUBJECT MATTER.

A dispute between a company and a current or former principal of the company about decisions made by individual principals of the company in their capacities as the company's agents is subject to binding arbitration when the company's operating agreement requires binding arbitration of any dispute between the company and a current or former principal of the company; principals acting on the company's behalf may be individually named in a complaint about a dispute, and the arbitration clause in the company's operating agreement applies to the principals as individuals.

Mark Granzotto, PC (by *Mark Granzotto*), and *Dean Altobelli* for plaintiff.

Kienbaum Opperwall Hardy & Pelton, PLC (by *Thomas G. Kienbaum* and *Noel D. Massie*), and *Smith Haughey Rice & Roegge* (by *John R. Oostema* and *E. Thomas McCarthy, Jr.*) for defendants.

BERNSTEIN, J. This case requires the Court to address whether plaintiff's tort claims against individual principals of a law firm fall within the scope of an arbitration clause that mandates arbitration for any dispute between the firm and a former principal. Generally speaking, a company may only act through its agents. In this case, plaintiff, a former principal, challenges actions the individual defendants performed in their capacities as agents carrying out the business of the firm. Therefore, this is a dispute between the firm and a former principal that falls within the scope of the arbitration clause and is subject to binding arbitration.

Accordingly, we reverse that part of the Court of Appeals' opinion holding that this matter was not

subject to arbitration. We vacate the remaining portion of the Court of Appeals' opinion, which relates to plaintiff's motion for partial summary disposition, and we remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 1993, plaintiff Dean Altobelli began working as an attorney for Miller, Canfield, Paddock and Stone, PLC (the Firm), a professional limited liability company formed under the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et seq*. Upon joining the Firm, plaintiff signed the "Miller Canfield Operating Agreement" (Operating Agreement), a document governing the Firm's internal affairs. The Operating Agreement provides that members of the Firm are referred to as "principals." All principals sign the Operating Agreement. The introductory section of the Operating Agreement states that the document "by and between the [Principals] . . . evidences the following agreement between them[.]" In a subsequent section, the principals further acknowledge that the "covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto[.]"

The Operating Agreement delegates particular responsibilities and powers to certain individuals within the Firm. A principal must devote "his or her full time and best efforts to the success of the Firm except as otherwise approved in writing by the CEO with the approval of the Managing Directors." Principals may "voluntarily withdraw from the Firm at any time" and shall involuntarily withdraw in the event of a two-thirds vote of the senior principals. Senior principals are principals who have been granted equity ownership in the Firm. Five senior principals, called the

"managing directors," are invested with "[s]ole, full and complete power and authority to manage . . . the Firm . . . ." Managing directors have the authority to designate a Chief Executive Officer (CEO), who has, "with binding effect on the Managing Directors, the power and authority of the Managing Directors with respect to the day-to-day administration of the business and affairs of the Firm."

The Operating Agreement also contains a mandatory arbitration agreement:

> 3.6 Alternative Dispute Resolution: Mandatory Arbitration. Any dispute, controversy or claim (hereinafter "Dispute") between the Firm or the Partnership and any current or former Principal or Principals of the Firm or current or former partner or partners of the Partnership (collectively referred to as the "Parties") of any kind or nature whatsoever (including, without limitation, any dispute[,] controversy or claim regarding step placement, or compensation, or the payment or non-payment of any bonus, the amount or change in amount of any bonus) shall be solely and conclusively resolved according to the following procedure:
>
> (a) In the event of a Dispute, the Parties agree to first try in good faith to settle the dispute directly. If the parties are unable to resolve the dispute, they shall submit the dispute to third party neutral facilitation in accordance with the mediation rules of the American Arbitration Association ("Mediation"). If the Dispute is not resolved by a signed Settlement Agreement within ninety (90) days of a written request for Mediation given to one Party by the other and identifying the Dispute, the Dispute shall be settled by binding arbitration ("Arbitration") in accordance with the internal laws of the State of Michigan. The Arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association except as specifically provided herein. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. There

> shall be three (3) arbitrators; one of whom shall be appointed by the Firm, one by the Principal(s) and/or partner(s) (as applicable) and the third of whom shall be appointed by the first two arbitrators. The hearing shall be held in the Detroit metropolitan area. [Emphasis added.]

By January 2006, plaintiff had become a senior principal at the Firm.[1] However, in late May or early June 2010, plaintiff decided he wanted to pursue a new opportunity as an assistant coach for the University of Alabama football team. Plaintiff proposed a 7- to 12-month leave of absence from the Firm to defendant Michael Hartmann, the Firm's CEO, and defendant Michael Coakley, who was the head of the Firm's litigation group but was not a managing director. Plaintiff suggested that the Firm permit him to maintain his ownership interest and return to the Firm as a senior principal any time before June 1, 2011.

Plaintiff avers that Hartmann initially promised plaintiff that he could spend as much time at the University of Alabama as he wanted and still receive certain allocated income from his clients. Hartmann disputes this, claiming that although he told plaintiff that he could "probably" return to the Firm, plaintiff knew Hartmann had no authority to make a formal commitment. Plaintiff contends that, in reliance on Hartmann's assurance, he moved to finalize his agreement with the University of Alabama in June 2010. Plaintiff claims he also spent many hours preserving his clients and business for the Firm.

Plaintiff alleges that Hartmann then withdrew his support, suddenly rejecting the proposed leave of ab-

[1] Although plaintiff was a senior principal, he was not a managing director, and plaintiff does not allege that he had any further authority in the Firm.

sence and instead suggesting that plaintiff voluntarily withdraw from the Firm without any assurance that he would be reinstated. In response, on July 10, 2010, plaintiff sent an e-mail to the managing directors seeking approval of the job opportunity with the University of Alabama and an exception to the section of the Operating Agreement obligating a principal to devote his or her full time to the Firm. Plaintiff claims he informed the managing directors that he had no plans to relinquish his principal status or compensation. On July 20, 2010, plaintiff submitted a statement to defendant Coakley detailing his past and projected contributions to the Firm. Plaintiff asserts that Hartmann informed plaintiff the next day that the managing directors had decided to terminate his equity ownership, effective July 31, 2010. In an e-mail response, plaintiff demanded a vote of the principals, asserting that the managing directors lacked the authority to terminate him under the Operating Agreement. On July 22, Hartmann replied: "I did not say the Firm had terminated your position. I told you that since you had voluntarily accepted a full time position at Alabama and had already started there, the Firm will consider you to have withdrawn from the partnership as of July 31, 2010." Plaintiff disputes this, contending that he did not voluntarily withdraw from the Firm, that he was improperly terminated, and that the Firm shorted plaintiff's 2010 income as a result.[2]

Plaintiff initially sought resolution through the direct settlement and mediation process provided for in the Operating Agreement. In November 2011, when

[2] While the parties dispute whether plaintiff voluntarily withdrew from the Firm in July 2010, it is undisputed that plaintiff eventually left the Firm, accepted a position at the University of Alabama, and is no longer a principal of the Firm.

these efforts failed, plaintiff filed a demand for arbitration with the American Arbitration Association, as outlined in the Operating Agreement. Plaintiff's arbitration demand contested his last five years of compensation and the managing directors' decision to treat his departure as a relinquishment of his equity ownership status. Plaintiff alleged bad-faith discrimination in the allocation of income, bad-faith violations of the Operating Agreement, bad-faith misrepresentation, bad-faith conspiracy to improperly exclude him from the Firm, and shareholder oppression in violation of MCL 450.4515.

Despite having set the arbitration proceeding in motion, and while the parties were in the process of selecting arbitrators, plaintiff turned the tide by filing the instant case in the Ingham Circuit Court. Plaintiff did not name the Firm itself as a defendant in the suit. Instead, plaintiff named seven individual principals of the Firm: Hartmann, Coakley, and the five managing directors (collectively, defendants).[3] In his circuit court complaint, plaintiff presented claims substantially similar to those he had alleged in arbitration, essentially repackaging them as tortious conduct: breach of fiduciary duty, illegal shareholder oppression contrary to MCL 450.4515, conversion, bad-faith misrepresentation, tortious interference with a business relationship or expectancy, and civil conspiracy.

In the circuit court, defendants filed a motion for summary disposition under MCR 2.116(C)(10) and a motion to compel arbitration under MCR 2.116(C)(7). In the motion to compel arbitration, defendants argued that plaintiff's claims fell within the scope of the Operating Agreement's mandatory arbitration clause

[3] As principals, each of these defendants had signed the Operating Agreement.

and that the circuit court was therefore compelled to dismiss the complaint. Plaintiff countered with a motion for partial summary disposition with respect to his claims of shareholder oppression, conversion, and tortious interference with a business relationship or expectancy. The circuit court denied defendants' motions, concluding that the dispute did not fall within the ambit of the arbitration clause. The circuit court granted plaintiff's motion for partial summary disposition, finding as a matter of law that plaintiff did not voluntarily withdraw from the Firm under MCL 450.4509(1)[4] or the Operating Agreement and that defendants had improperly terminated plaintiff's ownership interest without authority.

On appeal, the Court of Appeals affirmed the circuit court's denial of defendants' motion to compel arbitration, but reversed the circuit court's order granting plaintiff's motion for partial summary disposition. *Altobelli v Hartmann*, 307 Mich App 612, 640; 861 NW2d 913 (2014). With respect to the motion to compel arbitration, the Court of Appeals determined that the central question was whether plaintiff could sue the Firm's managers in their individual capacities or whether plaintiff was instead required to arbitrate his claims against them. *Id*. at 626. After examining the plain language of the arbitration clause, the Court of Appeals concluded that the provision only mandates arbitration of disputes between "the Firm" and "a Principal." *Id*. at 628. The Court of Appeals rejected defendants' argument that this was in essence a dispute between plaintiff and the Firm, noting that plaintiff's claims were asserted against defendants in their

[4] MCL 450.4509(1) provides in pertinent part: "A member may withdraw from a limited liability company only as provided in an operating agreement."

individual capacities and sought to hold them personally liable for their actions. *Id*. at 630-631. With respect to plaintiff's motion, the Court of Appeals found that MCL 450.4509(1) permits voluntary withdrawal if a firm's operating agreement allows for such withdrawal, even without specifying a particular method. *Id*. at 631-636. The Court of Appeals then found that a genuine issue of fact existed as to whether plaintiff voluntarily withdrew from the Firm, thus concluding that summary disposition was unwarranted. *Id*. at 636-640.

In this Court, defendants challenged the Court of Appeals' ruling on the motion to compel arbitration. Plaintiff filed a cross-appeal, challenging the Court of Appeals' findings on plaintiff's motion for partial summary disposition. For the reasons stated below, we reverse the Court of Appeals' judgment with respect to the motion to compel arbitration and vacate the remaining portions of the Court of Appeals' decision relating to plaintiff's motion for partial summary disposition.[5]

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision on a motion for summary disposition brought under

[5] In light of our resolution of defendant's application for leave to appeal, plaintiff's application for leave to appeal as cross-appellant is denied as moot.

Additionally, after oral argument in this Court, plaintiff filed a "Motion to Correct the Record and to Impose Sanctions for Misconduct at Mini Oral Argument." Plaintiff alleged that, on the record during oral argument, defendants misrepresented the Firm's indemnification obligations and also violated court procedures by allowing a supposedly unauthorized person to sit at defense counsel's table. Defendants responded in opposition. Plaintiff's motion is denied for lack of any legal or factual basis to support its claims.

MCR 2.116(C)(7). *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of "an agreement to arbitrate[.]" Whether a particular issue is subject to arbitration is also reviewed de novo, *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009), as is the interpretation of contractual language, *Morley v Auto Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998).

III. ANALYSIS

"Arbitration is a matter of contract." *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). Accordingly, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation. See *F J Siller & Co v City of Hart*, 400 Mich 578, 581; 255 NW2d 347 (1977). Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). In considering the scope of an arbitration agreement, we note that "[a] party cannot be required to arbitrate an issue which [it] has not agreed to submit to arbitration." *Kaleva*, 393 Mich at 587. "The general policy of this State is favorable to arbitration." *Detroit v A W Kutsche*, 309 Mich 700, 703; 16 NW2d 128 (1944). The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987).

In deciding the threshold question of whether a dispute is arbitrable, a reviewing court must avoid analyzing the substantive merits of the dispute. *Kaleva*, 393 Mich at 594-595. If the dispute is arbitrable, "the merits of the dispute are for the arbitrator." *Id*. at 595.

Applying these principles, we must consider whether the language of the arbitration clause in the Operating Agreement is intended to cover the instant dispute between plaintiff and the individually named defendants. The critical portion of the agreement reads:

> Any dispute, controversy or claim . . . between the Firm . . . and any current or former Principal . . . of any kind or nature whatsoever (including . . . compensation, or the payment or non-payment of any bonus . . .) shall be solely and conclusively resolved according to the following procedure [arbitration].

To resolve this issue, we must analyze two aspects of this provision. First, we must determine *who* the parties intended to include in the phrase "between the Firm . . . and . . . [a] former Principal." Second, we must determine whether *the subject matter* of the instant dispute is covered by the arbitration clause.

With respect to who is included, it is undisputed that plaintiff is a former principal. Therefore, this question turns on whether "the Firm" was meant to include the individually named defendants. Here, we must consider the concept of agency. Although no Michigan court has explicitly applied agency principles when interpreting an arbitration clause, it is well established that "corporations can only act through officers and agents." *Attorney General v Nat'l Cash Register Co*, 182 Mich 99, 111; 148 NW 420 (1914). See *Junius Ten Eyck v Pontiac, Oxford & Port Austin R Co*, 74 Mich 226, 232; 41 NW 905 (1889) ("The directors of a

corporation are its agents."); *Mossman v Millenbach Motor Sale*s, 284 Mich 562, 569; 280 NW 50 (1938) ("Where a corporation has intrusted a manager with the general supervision of a particular branch of its business, it invests him with the power of a general agent . . . .").[6] This reflects the fact that a company is not a physical being capable of taking its own actions or making its own decisions. Indeed, a firm cannot act on its own behalf. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 275; 870 NW2d 494 (2015). Therefore, "the acts of officers and agents of a corporation, within the scope of their employment, are the acts of the corporation[.]" *Nat'l Cash Register*, 182 Mich at 111.[7]

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[6] We recognize that some cited caselaw addresses situations where agents acted on behalf of "a corporation," whereas, in the instant case, the Firm is a professional limited liability company. However, in applying agency principles to interpret the instant arbitration clause, we see no reason to distinguish between a corporation and another type of company, and therefore we extend these established principles to the instant matter.

[7] In its opinion in the instant case, the Court of Appeals extensively reviewed two previous Michigan cases and ultimately found them inapplicable: *Hall v Stark Reagan, PC*, 294 Mich App 88; 818 NW2d 367 (2011), rev'd in part 493 Mich 903 (2012), and *Rooyakker & Sitz v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007). *Altobelli*, 307 Mich App at 625-631. In *Hall*, this Court considered an arbitration clause that covered " 'a dispute regarding interpretation or enforcement of . . . the parties' rights or obligations' " under a shareholders' agreement. *Hall*, 493 Mich at 903. This Court held that a dispute involving the motives of the defendants for invoking the separation provisions of the shareholders' agreement fell within the scope of that particular arbitration clause. *Id*. In *Rooyakker*, the Court of Appeals concluded that two tort claims against nonparties to an arbitration agreement fell within the scope of an arbitration clause that included "any dispute or controversy arising out of or relating to" the agreement. *Rooyakker*, 276 Mich App at 163. Not only was the language of the arbitration clauses in those cases substantially different from the arbitration clause in the instant case, but neither case considered whether claims against particular individuals, acting as agents, fell within the scope of an arbitration

Not only is this particular concept of agency ingrained in our caselaw, the statutory scheme governing the Operating Agreement also incorporates this principle. Under the Operating Agreement, the Firm is a limited liability company formed under the MLLCA. MCL 450.4401(a) states that if the management of a limited liability company is delegated to its members, "[t]he members are considered managers for purposes of applying this act, including section 406 regarding *the agency authority* of managers . . . ." (Emphasis added.) MCL 450.4406, in turn, states: "A manager is *an agent* of the limited liability company for the purpose of its business . . . ." (Emphasis added.) MCL 450.4402(4) adds: "If the articles of organization delegate management of a limited liability company to managers, the articles of organization constitute notice to third parties that managers, not members, have *the agency authority* described in section 406." (Emphasis added.) The MLLCA explicitly refers to agency authority and the ability of individuals to act as agents for limited liability companies, which further supports the application of agency principles to interpret the instant arbitration clause.

When interpreting an arbitration clause, other jurisdictions have similarly applied agency principles. In *Pritzker v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 7 F3d 1110, 1122 (CA 3, 1993) (citation omitted; alteration in original), the United States Court of Appeals for the Third Circuit noted that a corporation " 'can only act through its employees, and an arbitration agreement would be of little value if it did not extend to [them].' " In *Arnold v Arnold Corp-Printed Communi-*

clause, which is at issue in the instant case. We thus agree with the Court of Appeals that neither case is instructive in the instant matter.

cations for Business, 920 F2d 1269, 1281 (CA 6, 1990), the Sixth Circuit Court of Appeals reasoned that if a plaintiff could " 'avoid the practical consequences of an agreement to arbitrate by naming . . . signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified.' " (Citation omitted.) The First Circuit agreed:

> Such a rule is necessary, our sister circuits have reasoned, because a corporate entity or other business can only operate through its employees and an arbitration agreement would be a meaningless arrangement if its terms did not extend to them. . . . Any other rule, in the view of these courts, would permit the party bringing the complaint to avoid the practical consequences of having signed an agreement to arbitrate; naming the other party's officers, directors or employees as defendants along with the corporation would absolve the party of all obligations to arbitrate. [*Grand Wireless, Inc v Verizon Wireless, Inc*, 748 F3d 1, 11 (CA 1, 2014), citing *Arnold*, 920 F2d at 1281.]

For the above reasons, we hold that agency principles apply in determining who is included within the scope of the arbitration clause.

Next, we must consider whether the arbitration clause encompasses the subject matter of the dispute at issue in this case. Generally speaking, to ascertain whether the subject matter of a dispute is of the type that parties intended to submit to arbitration, we again begin with the plain language of the arbitration clause. See *Miller-Davis*, 495 Mich at 174. We then consider whether a plaintiff's particular action falls within that scope. We note that the gravamen of an action is determined by considering the entire claim. See *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). We look beyond the mere procedural labels to determine the exact nature of the claim. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 711;

742 NW2d 399 (2007). This is to avoid "artful pleading." *Maiden*, 461 Mich at 135.

IV. APPLICATION

Turning to the instant case, we first consider who is included within the scope of the arbitration clause in the Operating Agreement, and we next consider whether the subject matter of the instant dispute is covered by the clause. With respect to who is included, we begin with the plain language of the clause, asking whether the parties to the Operating Agreement intended to include these particular defendants within the meaning of "the Firm." See *Miller-Davis*, 495 Mich at 174. Here, we note that the Operating Agreement clearly recognizes the agency principles previously discussed. The Operating Agreement, signed "by and between" plaintiff and defendants as an "agreement between them," delegates authority to certain individuals to carry out the Firm's business and manage its internal affairs. Managing directors are invested with the "[s]ole, full and complete power and authority to manage . . . the Firm . . . ." The CEO has, "with binding effect on the Managing Directors, the power and authority of the Managing Directors with respect to the day-to-day administration of the business and affairs of the Firm." Thus, the language of the Operating Agreement evidences the parties' understanding that a company cannot act on its own, but instead depends on the actions of agents to carry out its business. See *Nat'l Cash Register*, 182 Mich at 111.[8] By

[8] We also note that the arbitration clause does not limit its scope to a dispute "*naming* the Firm" and a former principal, but rather "*between* the Firm" and a former principal. Had the parties intended that those named in the caption of a lawsuit dictate the scope of the agreement, they could have chosen particular language to indicate as much. The

signing the Operating Agreement and accepting the arbitration clause, plaintiff was aware that certain individuals would be operating on the Firm's behalf.[9]

Under the facts of this case, defendants are those individuals operating on the Firm's behalf. Defendants are the five managing directors, the CEO, and the head of the Firm's litigation group. The Operating Agreement explicitly endows them with complete power and responsibility for managing the affairs of the Firm.[10] As

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fact that they did not do so lends additional support to the conclusion that the plain language of the agreement evinces the intent to more broadly include agents within the meaning of "the Firm." Plaintiff cannot now avoid the practical consequences of the arbitration clause simply by naming defendants in their individual capacities only. See *Arnold*, 920 F2d at 1281; *Grand Wireless*, 748 F3d at 11.

[9] The Court of Appeals generally noted the following principle: " 'It is well established that corporate employees and officials are personally liable for all tortious and criminal acts in which they participate, regardless of whether they are acting on their own behalf or on behalf of a corporation.' " *Altobelli*, 307 Mich App at 630-631, quoting *Joy Mgt Co v Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990). But resolution of the issues presented in this appeal does not require the invocation of this principle. In this appeal, we must decide *in what venue* plaintiff must bring his dispute, not whether the individual defendants may be held personally liable for the tortious actions alleged within that dispute. We conclude that, because plaintiff's claims challenge defendants' actions taken in their capacity as agents of the Firm, plaintiff's dispute falls within the scope of this particular arbitration clause and must therefore be resolved in arbitration. Since this dispute must be resolved in arbitration, whether these defendants can be held personally liable for the challenged actions is a substantive matter reserved for the arbitrator. See *Kaleva*, 393 Mich at 595.

[10] We acknowledge that defendant Coakley is not a managing director or CEO, but rather is a principal who is the head of the Firm's litigation group. However, plaintiff does not argue that Coakley's unique status disqualifies him from being considered an agent. Regardless, this argument would be meritless because principals too can be agents of a company. See *Mossman*, 284 Mich at 568; MCL 450.4401; MCL 450.4404(2)(a) ("In discharging the manager's duties, a manager may rely on information, opinions, reports, or statements . . . if prepared or presented by [a manager or principal] whom the manager reasonably

officers, managers, and directors entrusted with carrying out the Firm's business, defendants are agents of the Firm. *Junius Ten Eyck*, 74 Mich at 232; *Mossman*, 284 Mich at 569; MCL 450.4406. Their acts are acts of the company. *Nat'l Cash Register*, 182 Mich at 111. Because it is axiomatic that the Firm cannot act on its own, *Fraser Trebilcock*, 497 Mich at 275, and because these particular defendants are clearly endowed with agency authority to administer the Firm's affairs, the individually named defendants must be included within the meaning of "the Firm" in the arbitration clause.[11]

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believes to be reliable and competent in the matter presented."). The Operating Agreement itself states that "[t]he Principals do hereby agree to . . . engage in the practice of law under the name 'Miller, Canfield, Paddock and Stone, P.L.C.' " and that "[e]ach Principal shall devote his or her full time and best efforts to the success of the Firm . . . ."

[11] The Court of Appeals noted that the arbitrator selection process in the arbitration clause requires the selection of three arbitrators, "one of whom shall be appointed by the Firm, one by the Principal(s) . . . and the third of whom shall be appointed by the first two arbitrators." *Altobelli*, 307 Mich App at 628 (quotation marks omitted). The Court of Appeals reasoned that, in a dispute between principals, the Firm would not be a party, yet the selection process would nonetheless require the Firm to select an arbitrator. *Id*. The Court of Appeals concluded that this evinced the parties' intent to distinguish between the Firm and its principals as well as an intent to exclude disputes between principals from the scope of the arbitration clause. *Id*.

Certainly, this language distinguishes between the Firm and *an adversarial principal* in the arbitration proceeding, giving each the power to select an arbitrator. This provision does not, however, demonstrate any intent to exclude individual principals from the meaning of "the Firm." The selection procedure still functions even if the proceeding involves individually named defendants and a plaintiff; the defendants could collectively choose one arbitrator, and the plaintiff could choose another. In fact, were we to agree with the Court of Appeals that individuals could not be included within the meaning of "the Firm," this selection process would not work. The Firm, a company, cannot actually appoint its own arbitrators. The Firm itself cannot take any action at all. Instead, the act of appointing an arbitrator must be done by the

Next, we turn to whether the arbitration clause covers the subject matter of the dispute at issue in this case. The arbitration clause covers "[*a*]*ny dispute*, controversy or claim . . . between the Firm . . . and [a] former Principal . . . *of any kind or nature whatsoever* (including . . . compensation, or the payment or non-payment of any bonus . . .)." (Emphasis added.) At the outset, we emphasize the extremely broad and inclusive language of this provision. The plain language of the arbitration clause indicates that "any dispute" must be between the Firm and a former principal. Therefore, we consider more specifically whether the subject matter of the dispute reflects actions taken by the individual defendants as agents of the Firm.

In considering the gravamen of plaintiff's complaint, we examine the entire claim, looking beyond procedural labels to determine the exact nature of the claim. *Maiden*, 461 Mich at 135; *Adams*, 276 Mich App at 710-711. The result of this inquiry indicates that the instant dispute falls within the wide expanse of "any dispute" between the Firm and a current or former principal. To begin, in the factual recitation section of his complaint, plaintiff states that he initially approached defendants Hartmann and Coakley to propose a leave of absence that might have put him at odds with the section of the Operating Agreement obligating a principal to devote his or her full time to the Firm. In doing so, plaintiff acknowledged that his request was subject to the rules established in the Operating Agreement and also that he believed Hart-

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Firm's representatives in the arbitration proceeding. In ascertaining the intent of the parties at the time they entered into the contract, see *Miller-Davis Co*, 495 Mich at 174, we must conclude that this undeniable reality was understood by the parties. This further demonstrates the intent to include individual principals within the meaning of "the Firm" without explicitly stating as much in the arbitration clause.

mann and Coakley had the authority to sanction his proposal. Similarly, when Hartmann appeared unreceptive, plaintiff informed the managing directors that he did not intend to relinquish his equity status or compensation, again informing the Firm's decision-makers that he sought protection under the Operating Agreement. Plaintiff subsequently demanded the requisite two-thirds vote of the principals before his membership could be terminated, as outlined in the Operating Agreement. Believing that the managers ultimately terminated his ownership without this necessary vote, plaintiff now requests economic damages, particularly the "fair allocation of income (salary and bonuses)." Thus, the essence of plaintiff's allegations is that defendants' actions deprived plaintiff of the compensation and bonuses to which he was entitled. The arbitration clause explicitly encompasses a dispute involving "*compensation*, or the payment or non-payment of *any bonus*[.]" (Emphasis added.) This alone places plaintiff's dispute squarely under the mantle of the arbitration clause.

Examining plaintiff's individual claims further entrenches this dispute within the scope of the arbitration clause. Plaintiff first alleges breach of fiduciary duty. Plaintiff substantiates this claim with numerous factual allegations which inextricably tie defendants' actions as agents of the Firm to the deprivation of plaintiff's rights under the Operating Agreement. "Bad-faith" allegations against defendants include "refusing to disclose information relevant to the affairs of the Firm," "excluding [plaintiff] from involvement in significant Firm committees," "isolating [plaintiff] from discussions about a client," and "terminat[ing plaintiff's] ownership position without a vote of the Firm's owners." All of these alleged actions reflect decisions made by defendants in their capacities as the

Firm's agents, employing powers provided to them under the Operating Agreement and agency principles. See *Mossman*, 284 Mich at 569 ("Where a corporation has intrusted a manager with the general supervision of a particular branch of its business, it invests him with the power of a general agent . . . .") (quotation marks and citation omitted); see also MCL 450.4401; MCL 450.4402(4). Therefore, this particular claim involves a dispute between the Firm and plaintiff, and is thus covered by the arbitration clause.

Likewise, to substantiate his claims of illegal shareholder oppression under MCL 450.4515, tortious interference with a business relationship or expectancy, and civil conspiracy, plaintiff asserts that defendants improperly terminated plaintiff's ownership in contravention of procedures established by the Operating Agreement. Plaintiff's conversion claim maintains that defendants "deprived [plaintiff] of his property without due process required by law—the process required by the Operating Agreement." Plaintiff's claim alleging bad-faith misrepresentation avers that defendants intentionally duped plaintiff in order to secure the Firm's business for themselves and other principals. Thus, in each individual claim, plaintiff takes issue with defendants' actions as agents making decisions for the Firm, which plaintiff believes interfered with his financial entitlements under the Operating Agreement.

In sum, plaintiff's dispute falls within the scope of the mandatory arbitration clause in the Operating Agreement. A company can only act through its agents, the individual defendants are agents of the Firm, and plaintiff's claims inextricably tie defendants' actions as agents to the alleged deprivation of plaintiff's rights under the Operating Agreement. Plaintiff's dispute is subject to binding arbitration.

V. CONCLUSION

We reverse the part of the Court of Appeals' opinion regarding the motion to compel arbitration and instead hold that this case is subject to binding arbitration under the arbitration clause of the Operating Agreement. Accordingly, the lower courts should not have reached the merits of plaintiff's motion for partial summary disposition, as the motion addresses substantive contractual matters that must be resolved by the arbitrator. Therefore, we vacate the portion of the Court of Appeals' opinion related to plaintiff's motion for partial summary disposition and remand this case to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

PEOPLE v ALLEN

Docket No. 151843. Argued April 7, 2016 (Calendar No. 3). Decided June 15, 2016.

Floyd P. Allen was convicted in the Ionia Circuit Court of a second offense of failing to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., after he failed to properly register his address. MCL 28.729(1)(b) provides for a maximum sentence of 7 years upon conviction of a second violation of SORA (hereafter, SORA-2), but the court, David A. Hoort, J., sentenced defendant under MCL 769.10(1)(a) to 2 to 10.5 years' imprisonment as a second-offense habitual offender on the basis of his two convictions for violating SORA. Defendant appealed, arguing in part that he was entitled to resentencing because the trial court erred when it enhanced his sentence under the habitual-offender provisions. The Court of Appeals, BECKERING, P.J., and BORRELLO and GLEICHER, JJ., vacated defendant's sentence and remanded for resentencing, agreeing that the sentence imposed for defendant's SORA-2 conviction could not be enhanced under the applicable habitual-offender statute. The panel concluded that MCL 28.729(1)(a), (b), and (c) set forth one offense (violating SORA) with escalating punishments for repeat convictions. Because the second-offense habitual-offender provision, MCL 769.10(1)(a), directs a court sentencing an offender convicted of a subsequent offense to impose a maximum term that is not more than 1½ times the longest term prescribed for a first conviction of that offense and the maximum term prescribed under MCL 28.729(1)(a) for a first conviction of violating SORA (SORA-1) is 4 years' imprisonment, the panel concluded that defendant would have been subject to no more than 6 years' imprisonment upon habitual-offender enhancement. The panel further concluded that SORA and the habitual-offender statutes conflicted and that because SORA was controlling, defendant's maximum sentence should have been 7 years. 310 Mich App 328 (2015). The Supreme Court granted the prosecution's application for leave to appeal. 498 Mich 910 (2015).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN, MCCORMACK, and LARSEN, the Supreme Court *held*:

The sentence imposed for defendant's second conviction of violating SORA could be enhanced under the habitual-offender statutes using defendant's first conviction for violating SORA because in MCL 28.729 the Legislature created separate offenses for subsequent violations of SORA and nothing in SORA or the habitual-offender provisions precludes a court from using the applicable habitual-offender statute to enhance the maximum sentence provided by MCL 28.729(1)(b) for a second violation of SORA.

1. The habitual-offender statutes, enacted as part of Chapter IX of the Code of Criminal Procedure, MCL 769.1 *et seq*., contain three sections to enhance sentences imposed on recidivist offenders: MCL 769.10, which applies to those sentenced for their second felony convictions; MCL 769.11, which applies to those sentenced for their third felony convictions; and MCL 769.12, which applies to those sentenced for their fourth or higher felony convictions. The Legislature did not intend to make being a habitual offender a separate substantive crime; instead, it intended, for deterrent purposes, to augment the punishment for second or subsequent offenses. MCL 769.10(1)(a) provides that if a person has been convicted of a felony and commits a subsequent felony that is punishable upon a first conviction by imprisonment for a term less than life, the court may sentence the person to imprisonment to a maximum term that is not more than 1½ times the longest term prescribed for a first conviction of that offense or a lesser term. The prosecution and the trial court agreed that the phrase "that offense" in the statute refers to separate felony convictions under MCL 28.729(1). Accordingly, it was necessary to determine whether SORA sets forth a single substantive offense with enhanced punishments for subsequent violations or whether it establishes three separate and distinct substantive offenses for recidivist behavior.

2. MCL 28.729(1) provides that an individual required to register as a sex offender under SORA who willfully violates the act is guilty of a felony. Subdivision (a) provides that if the individual has no prior convictions for a violation of SORA (SORA-1), the violation is punishable by imprisonment for not more than 4 years or a fine of not more than $2,000, or both. Subdivision (b) provides that if the individual has one prior conviction for violating SORA (SORA-2), the violation is punishable by imprisonment for not more than 7 years or a fine of not

more than $5,000, or both. Finally, Subdivision (c) provides that if the individual has two or more prior convictions under SORA (SORA-3), the violation is punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both. Reading SORA, the habitual-offender provisions, and the sentencing guidelines (MCL 777.1 *et seq*.) *in pari materia* and the amendment history of those statutes indicated that the Legislature created three separate and distinct felonies in MCL 28.729(1) and that the Legislature intended by enacting SORA-2 and SORA-3 to elevate each offense, not merely enhance the punishment.

3. The Court of Appeals erred by interpreting MCL 28.729(1) and MCL 769.10 as directly conflicting. Defendant was charged with and convicted of SORA-2, MCL 28.729(1)(b), and not a violation of SORA generally. The longest term prescribed for a first conviction of SORA-2 under MCL 28.729(1)(b) is 7 years. MCL 769.10(1)(a) states that the court may sentence a defendant to a term of imprisonment 1½ times the longest term prescribed for a first conviction of that offense. Because defendant was subject to a 7-year maximum term of imprisonment for his SORA-2 conviction, the trial court appropriately exercised its discretion by sentencing defendant to 1½ times that statutory maximum, i.e., 10.5 years.

Court of Appeals' judgment reversed; case remanded to circuit court for reinstatement of original judgment of sentence.

Justice VIVIANO, joined by Justice BERNSTEIN, concurring in the result only, agreed with the majority that defendant's second conviction of failing to comply with SORA was subject to sentence enhancement under the second-offense habitual-offender provision but would, however, have reached that conclusion on more limited grounds. Defendant conceded before the Supreme Court that SORA-2 is a separate felony subject to habitual-offender enhancement when he admitted that habitual-offender enhancement of a SORA-2 sentence is permissible in certain circumstances, but he provided no briefing on the point, leaving the Supreme Court without a full discussion of any arguments that might have run counter to the prosecution's position. Given defendant's concession regarding the prosecution's argument, the only question was whether defendant's SORA-1 conviction could be used as support for both convicting him of SORA-2 and enhancing his sentence as a second-offense habitual offender. While troubled by the prosecution's ability to do so, Justice VIVIANO nonetheless agreed with the majority's conclusion that it was permissible in this case. Nothing in the plain language of

MCL 28.729 or MCL 769.10 prohibits the prosecution or the court from using defendant's SORA-1 conviction to support a double enhancement. Justice VIVIANO, however, would have limited that holding to this case and left open for another day the question whether MCL 28.729(1) creates three separate offenses or only one offense with escalating punishments and instead relied on defendant's concession to hold that, for the purposes of this case only, SORA-2 constitutes a separate felony offense subject to habitual-offender enhancement.

SEX OFFENDERS REGISTRATION ACT — SUBSEQUENT OFFENSES — HABITUAL-OFFENDER ENHANCEMENT.

An individual required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., who willfully violates the act is guilty of one of three separate and distinct offenses: an individual with no prior SORA convictions who violates SORA is guilty under MCL 28.729(1)(a) of a felony punishable by imprisonment for not more than 4 years, an individual who violates SORA and has one prior SORA conviction is guilty under MCL 28.729(1)(b) of a felony punishable by imprisonment for not more than 7 years, and an individual who violates SORA and has two or more prior SORA convictions is guilty under MCL 28.729(1)(c) of a felony punishable by imprisonment for not more than 10 years; the sentence imposed for a conviction of violating MCL 28.729(1)(b) or (c) may be enhanced under the habitual-offender statutes (MCL 769.10, MCL 769.11, and MCL 769.12) by using the offender's prior SORA convictions as the basis for enhancement.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Ronald J. Shafer*, Prosecuting Attorney, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

John W. Ujlaky for defendant.

ZAHRA, J. This case presents the question whether someone convicted of failing to comply with the Sex Offenders Registration Act (SORA)[1] as a second of-

[1] MCL 28.721 *et seq*.

fender, MCL 28.729(1)(b) (SORA-2),[2] can be subject to sentence enhancement under the habitual offender act (HOA).[3] The trial court sentenced defendant as a second-offense habitual offender on the basis of his prior conviction for violating the registration requirements of MCL 28.729(1)(a) (SORA-1) and his instant conviction for violating MCL 28.729(1)(b) (SORA-2).[4] There can no dispute that at the time of sentencing, defendant had been convicted of two felonies. But because defendant could not be convicted of SORA-2 without first having been convicted of SORA-1, defendant maintains that his SORA-1 conviction cannot also be used under the HOA to enhance the sentence imposed for the SORA-2 conviction. The Court of Appeals agreed with defendant. We reverse. We hold that the sentence imposed for defendant's SORA-2 conviction can be enhanced under the habitual-offender statutes because the Legislature created separate offenses for subsequent violations of SORA. Nothing in SORA or the HOA precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute. This conclusion is consistent with Michigan caselaw addressing the application of the habitual-offender statutes to other recidivism statutory schemes. Accordingly, we reverse the judgment of the Court of Appeals, remand the case to the Ionia Circuit Court, and direct

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[2] See note 33 of this opinion.

[3] MCL 769.10, MCL 769.11, MCL 769.12, and MCL 769.13. Specifically, defendant was charged under the second-offense habitual-offender statute, MCL 769.10(1)(a), which provides in relevant part that upon conviction of a second felony, the court may sentence the defendant to a term of imprisonment that is "1½ times the longest term prescribed for a first conviction of that offense or for a lesser term."

[4] MCL 28.729(1)(c) covers violating SORA a third or subsequent time (SORA-3).

that court to reinstate defendant's original judgment of sentence of 2 to 10.5 years as a second-offense habitual offender for his SORA-2 conviction.

I. FACTS AND PROCEDURAL HISTORY

As a result of a 2007 misdemeanor conviction of fourth-degree criminal sexual conduct, defendant was required to register on the Michigan Sex Offender Registry semiannually for 25 years. Defendant failed to properly register and in February 2010 pleaded guilty of SORA-1, a felony, and was sentenced to 5 years' probation, with the first 4 months served in jail. On April 30, 2012, defendant registered his address as 6123 Clarksville Road in Clarksville, Michigan. He verified that address on January 9, 2013. In March 2013, Clarksville police received an anonymous tip that defendant was not living at the Clarksville Road address, but at 211 West Riverside. After investigating, police determined that the Clarksville Road address was vacant and that defendant was staying at 211 West Riverside, the home of his spouse.[5] Defendant was arrested for failing to comply with SORA. In June 2013, a jury convicted defendant of SORA-2. Although MCL 28.729(1)(b) provides for a maximum sentence of 7 years, the trial court sentenced defendant under MCL 769.10(1)(a) as a second-offense habitual offender to 2 to 10.5 years' imprisonment.[6]

Defendant appealed, arguing, among other things, that he is entitled to resentencing because the trial court erred when it enhanced his sentence under the habitual-offender provisions. The Court of Appeals

[5] Defendant was found living with his spouse even though he was precluded from having any contact with her under the terms of his probation.

[6] See note 3 of this opinion.

vacated defendant's sentence and remanded for resentencing, concluding that the sentence imposed for defendant's SORA-2 conviction could not be enhanced under the applicable habitual-offender statute.[7]

The Court of Appeals noted that the "language of MCL 769.10(1)(a) directs a sentencing court to sentence the offender for a subsequent offense to a maximum term 'that is not more than 1½ times the longest term prescribed *for a first conviction* of that offense . . . .' "[8] The Court of Appeals concluded that MCL 28.729(1), which delineates SORA-1, SORA-2 and SORA-3, sets forth *one* offense with escalating punishments for repeat convictions, stating:

> The maximum term prescribed for a first conviction of that offense is 4 years' imprisonment. MCL 28.729(1)(a). Thus, under MCL 769.10(1)(a) defendant would be subject to no more than 6 years' imprisonment—1½ times 4 years is 6 years. The trial court erred by basing defendant's sentence on 1½ times the maximum prison sentence (7 years) provided under MCL 28.729(1)(b) because that provision sets forth the punishment for a second conviction of failure to comply with SORA. The plain language of MCL 769.10(1)(a) clearly directs a court to enhance a sentence by increasing the longest term prescribed for a first conviction of the subsequent offense, not the longest term prescribed for a second conviction.[9]

As a result, the Court of Appeals concluded that SORA and the HOA conflicted because under the applicable habitual-offender statute, defendant was subject to not more than a 6-year prison sentence, while under SORA-2, MCL 28.729(1)(b), defendant was

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[7] *People v Allen*, 310 Mich App 328; 872 NW2d 21 (2015).

[8] *Id*. at 349.

[9] *Id*. at 350.

subject to a 7-year maximum sentence.[10] The Court of Appeals described MCL 28.729(1)(a) to (c) as "set[ting] forth the penalties for failing to comply with the requirements of SORA."[11] Because the maximum prison sentence prescribed under the applicable habitual-offender statute is different from the maximum prison sentence prescribed under SORA-2, the Court of Appeals concluded that "the two statutes irreconcilably conflict."[12] The Court of Appeals held that because SORA-2 specifically applies to subsequent violations of SORA, whereas the HOA generally applies to subsequent felony convictions, SORA is controlling, and defendant's maximum sentence should have been 7 years.[13]

We granted leave to address "whether the second-offense habitual-offender enhancement set forth under MCL 769.10 may be applied to the sentence prescribed under MCL 28.729(1)(b)."[14]

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

We review de novo questions of statutory interpretation.[15] When interpreting a statute, courts must strive to give effect to the Legislature's intent.[16] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the

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[10] *Id*. at 350-351.

[11] *Id*. at 350.

[12] *Id*. at 350-351.

[13] *Id*. at 351.

[14] *People v Allen*, 498 Mich 910 (2015).

[15] *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015); *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014).

[16] *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012).

Legislature's intent."[17] The Legislature is presumed to have intended the meaning it plainly expressed in the statute.[18] When the statutory language is clear and unambiguous, judicial construction is not permitted, and the statute is enforced as written.[19]

In this case we examine the interplay between several statutes: the HOA, SORA, and the sentencing guidelines, MCL 777.1 *et seq*. "[A] court's duty is to give meaning to all sections of a statute and to avoid, if at all possible, nullifying one by an overly broad interpretation of another."[20] More specifically, it is appropriate to read the sentencing guidelines and the HOA, which are part of Michigan's Code of Criminal Procedure,[21] "together with the substantive statutes that the Legisalture has enacted that define crimes and prescribes fines and costs."[22] Thus, the sentencing guidelines, the HOA, and SORA should be read *in pari materia*.[23]

III. ANALYSIS

A. THE HABITUAL OFFENDER ACT

In 1927, Michigan enacted the HOA as part of Chapter IX of the Code of Criminal Procedure.[24] It contains three sections to enhance sentences imposed

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[17] *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

[18] *In re AJR*, 496 Mich 346, 353; 852 NW2d 760 (2014). See also *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012).

[19] *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

[20] *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

[21] MCL 760.1 *et seq*.

[22] *People v Cunningham*, 496 Mich 145, 156 n 8; 852 NW2d 118 (2014).

[23] *Id*. ("[T]he Penal Code and the Code of Criminal Procedure 'relate generally to the same thing and must therefore be read *in pari materia* . . . .' "), quoting *People v Smith*, 423 Mich 427, 442; 378 NW2d 384 (1985).

[24] See 1927 PA 175.

on recidivist offenders. MCL 769.10 applies to those sentenced for their second felony convictions, MCL 769.11 applies to those sentenced for their third felony convictions, and MCL 769.12 applies to those sentenced for their fourth or higher felony convictions. This Court has repeatedly stated that, by enacting the HOA, "the legislature did not intend to make a separate substantive crime out of being a habitual offender but rather, for deterrent purposes, intended to augment the punishment for second or subsequent offenses."[25]

Importantly, in 1998 the Legislature expressly instructed courts when enhancement under the HOA is inapplicable. Each of the three enhancement sections states: "A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section."[26] We presume, as we must, that the Legislature was well aware of these provisions of the HOA when it amended SORA in 1999 to create SORA-1, SORA-2, and SORA-3.[27] We also presume that the Legislature was aware that Michigan courts had applied the HOA to other recidivism criminal statutes at the time the pertinent provisions of SORA became law.[28] Significantly, the Legislature added nothing to SORA to exempt it from application of the HOA.

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[25] *People v Shotwell*, 352 Mich 42, 46; 88 NW2d 313 (1958).

[26] MCL 769.10(3), MCL 769.11(3), and MCL 769.12(3), all as amended by 1998 PA 317.

[27] See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 506; 475 NW2d 704 (1991) ("[T]he Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court.").

[28] E.g., *People v VanderMel*, 156 Mich App 231, 232; 401 NW2d 285 (1986). The defendant in that case pleaded guilty of second-degree criminal sexual conduct, MCL 750.520c(1)(b), and having committed a

The Legislature has also demonstrated that when it intends to do so, it is able to exclude particular categories of felonies from the HOA.[29] For example, the HOA was amended in 1978 to explicitly exclude application of the HOA to subsequent major controlled substance offenses by adding the following language to MCL 769.10 and substantially similar language to MCL 769.11 and MCL 769.12:

> If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by Act No. 196 of the Public Acts of 1971, as amended, being sections 335.301 to 335.367 of the Michigan Compiled Laws.[30]

The HOA makes no such exception for convictions under SORA's recidivism provisions, MCL 28.729(1)(a), (b), and (c). The Legislature has amended various criminal statutes to expressly prohibit application of the HOA to an offense,[31] but it has not seen fit

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second criminal sexual conduct offense, MCL 750.520f, and was sentenced as a second-offense habitual offender under MCL 769.10. The Court of Appeals held that both the recidivism criminal sexual conduct statute, MCL 750.520f, and the habitual-offender statute, MCL 769.10, could be concurrently applied. *Id*. at 235-237. In so holding, the Court of Appeals stated, "Because the Legislature has not prohibited concurrent application of MCL 750.520f and the habitual offender statutes, we decline to do so . . . ." *Id*. at 236-237 (citation omitted).

[29] *People v Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991).

[30] MCL 769.10(1)(c), as amended by 1978 PA 77. See also MCL 769.11(1)(c) and MCL 769.12(1)(c), both as amended by 1978 PA 77. The reference was to the former Controlled Substances Act. Subsequently, 1988 PA 90 revised the reference to Chapter 74 of the Public Health Code, MCL 333.7401 *et seq*.

[31] For example, in 1998 PA 311, the Legislature revised the first-degree retail fraud statute, MCL 750.356c, to state:

> If the sentence for a conviction under this section is enhanced by 1 or more prior convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant

to adopt a similar exception for SORA-2 and SORA-3 convictions, although it has had numerous opportunities to do so.[32]

There being no statutory bar to the application of the HOA to SORA, the trial court sentenced defendant as a second-offense habitual offender under MCL 769.10(1)(a), which states:

> If a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony . . . as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may place the person on probation or sentence the person to imprisonment for a maximum term that is

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to section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12. [MCL 750.356c(6).]

Similar prohibitions against application of the habitual-offender sentence enhancements can be found in MCL 750.79(4) (intent to commit arson); MCL 750.131(5) (checks drawn on insufficient funds); MCL 750.157s(4) (use of revoked or canceled financial transaction devices with intent to defraud); MCL 750.157w(4) (use of financial transaction device in excess of funds with intent to defraud); MCL 750.174(11) (embezzlement); MCL 750.218(10) (false pretenses); MCL 750.356(9) (larceny); MCL 750.362a(8) (refusal/neglect to return rented vehicle); MCL 750.377a(4) (malicious destruction of personalty); MCL 750.535(11) (receiving or concealing stolen property); and MCL 750.540g(4) (unauthorized use of telecommunications services). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

[32] The Legislature has amended SORA several times since its enactment and has elected to not preclude application of the habitual-offender provisions to a SORA-2 or SORA-3 conviction.

> not more than 1½ times the longest term prescribed *for a first conviction of that offense* or for a lesser term. [Emphasis added.]

Defendant maintains, and the Court of Appeals agreed, that the words "that offense" refer to violations of SORA generally under MCL 28.729(1). Defendant's position is premised on the notion that MCL 28.729(1)(a) to (c) are merely sentence-enhancement provisions applicable when there are repeat violations of SORA. The prosecution contends, and the trial court agreed, that the words "that offense" refer to separate felony convictions under MCL 28.729(1), in this case SORA-2, MCL 28.729(1)(b). Accordingly, we must determine whether SORA sets forth a single substantive offense with enhanced punishments for subsequent violations or whether SORA provides three separate and distinct substantive offenses for recidivist behavior.

B. SORA CREATES THREE SEPARATE OFFENSES

There is strong textual support leading to the conclusion that the Legislature created three separate offenses in MCL 28.729(1).[33] When the Legislature enacted SORA in 1994, it delineated only one offense

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[33] MCL 28.729(1) currently provides:

> [A]n individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:
>
> (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.
>
> (b) If the individual has 1 prior conviction for a violation of this act, by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.

punishable by 4 years' imprisonment, a fine, or both.[34] Had that section been left in its original form, there would have been no doubt that subsequent violations of SORA would be subject to enhancements under the HOA and, for a second-offense habitual offender, the maximum sentence would be 6 years, 1½ times the 4-year sentence. But the Legislature amended SORA in 1999 to set forth SORA-1, SORA-2, and SORA-3.[35] Simultaneously, the Legislature amended the sentencing guidelines, MCL 777.1 *et seq*., to address the SORA amendments.[36]

The sentencing guidelines expressly assign felonies an offense category and offense class, and MCL 777.11 to MCL 777.18 give descriptions of the offenses and identify the statutory maximum terms of imprisonment. Before the 1999 amendment of SORA that set forth SORA-1, SORA-2, and SORA-3, MCL 777.11 (as originally enacted by 1998 PA 317) identified MCL 28.729 as establishing one offense, a Class G felony,[37]

(c) If the individual has 2 or more prior convictions for violations of this act, by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

[34] MCL 28.729(1), as enacted by 1994 PA 295, provided:

An individual required to be registered under this act who willfully violates this act is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

[35] 1999 PA 85, effective September 1, 1999.

[36] 1999 PA 90, effective September 1, 1999.

[37] All offenses to which the guidelines apply are classified in a manner that generally corresponds to the seriousness of the offense. This gradation of seriousness is indicated by the offense's class, which is designated by the letters "M2" (second-degree murder) and "A" through "H," in order of decreasing seriousness. For example, when scoring Prior Record Variable (PRV) 1, MCL 777.51, a "high severity felony conviction" is defined in part as a conviction for a "crime listed in class M2, A,

punishable by up to 4 years' imprisonment and described as "Sex offenders—failure to register[.]" In 1999 PA 90, the Legislature amended MCL 777.11 to list SORA-1, SORA-2, and SORA-3 as separate and distinct offenses.[38] While the Legislature designated the three offenses as being in the offense category of "crimes against public order,"[39] it did not assign the same offense class to all three. Furthermore, the Legislature gave different descriptions for all three. SORA-1, MCL 28.729(1)(a), is a Class F felony, punishable by up to 4 years' imprisonment and described as "Failure to register as a sex offender, first offense[.]"[40] SORA-2, MCL 28.729(1)(b), is a Class D felony, punishable by up to 7 years' imprisonment and described as "Failure to register as a sex offender, second offense[.]"[41] SORA-3, MCL 28.729(1)(c), is a Class D felony, punishable by up to 10 years' imprisonment and described as "Failure to register as a sex offender, third or subsequent offense[.]"[42] The Legislature's references to SORA-1, SORA-2, and SORA-3 as individual offenses, its classification of these offenses in two different offense classes, and its differing offense descriptions and penalties demonstrate that the Legislature

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B, C, or D"; when scoring PRV 2, MCL 777.52, a "low severity felony conviction" is defined in part as a conviction for a "crime listed in class E, F, G, or H[.]"

[38] At that time, MCL 28.729 was listed in MCL 777.11. Subsequently, 2002 PA 31 added several new sections to the guidelines, and MCL 28.729 became listed in MCL 777.11b.

[39] MCL 777.5(d); MCL 777.11b. All offenses to which the sentencing guidelines apply belong to one of six offense categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety. MCL 777.5(a) to (f).

[40] MCL 777.11b.

[41] *Id*.

[42] *Id*.

intended these offenses to be separate and distinct felonies that elevate in severity for recidivist behavior.

Having concluded that SORA does indeed create three separate offenses, we return to the provision of the HOA at issue:

> If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1½ times the longest term prescribed for a *first conviction of that offense* or for a lesser term.[43]

The words "first conviction of that offense" plainly refer to "the subsequent felony" identified in the first part of the sentence. Defendant's subsequent felony is his conviction in June 2013 of SORA-2, which is punishable by a maximum of 7 years' imprisonment.

We conclude that the Court of Appeals erred by interpreting MCL 28.729(1) and MCL 769.10 as directly conflicting. Defendant was charged with and convicted of SORA-2, MCL 28.729(1)(b), and not a violation of SORA generally. We must then consider the longest term prescribed for a first conviction of SORA-2 under MCL 28.729(1)(b), which, again, is 7 years. MCL 769.10(1)(a) states that the court may sentence a defendant to a term of imprisonment 1½ times the longest term prescribed for a "first conviction of *that offense*."[44] The Court of Appeals, by holding that MCL 28.729(1) sets forth a single offense, erroneously read the phrase "that offense" as meaning any violation under MCL 28.729. Consequently, the Court of Appeals mistakenly concluded that the phrase "first conviction of that offense" in MCL 769.10(1)(a) referred to

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[43] MCL 769.10(1)(a) (emphasis added).

[44] Emphasis added.

MCL 28.729(1)(a) (SORA-1) and that, as a result, defendant's maximum sentence as a second-offense habitual offender would be 6 years. Rather, defendant was subject to a 7-year maximum term of imprisonment, and the trial court appropriately exercised its discretion in sentencing defendant to 1½ times that statutory maximum, i.e., 10.5 years.[45]

C. CASELAW SUPPORTS APPLICATION OF THE HOA TO A SORA-2 CONVICTION

Michigan caselaw also supports our conclusion that a SORA-2 conviction can be enhanced under the HOA. In *People v Bewersdorf*, one of the defendants, Bewersdorf, pleaded guilty of operating a motor vehicle while under the influence of intoxicating liquor, third offense (OUIL-3), a felony punishable by up to 5 years' imprisonment, and of being a second-offense habitual of-

[45] We do not quibble with the notion that the Legislature clearly set the maximum penalty for two convictions of violating SORA at 7 years. Implicit in defendant's argument and the Court of Appeals' opinion is the notion that, having set that penalty, the Legislature could not have intended to also allow a sentencing court to impose a 10.5 year maximum sentence. But as outlined in this opinion, it is clear that this is exactly what the Legiature intended. The Legislature was fully aware that sentence enhancement under the HOA is not mandatory, as vast discretion with regard to sentence enhancement is placed in the sentencing court and the prosecution. A sentencing court can exercise the option to not enhance a defendant's sentence. See MCL 769.10(1)(a) ("[T]he court . . . . *may* place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1½ times [the applicable term]."") (emphasis added); *People v Turski*, 436 Mich 878 (1990). In order to seek sentence enhancement under the HOA, the prosecuting attorney must file a written notice of intent to do so. MCL 769.13. The prosecutor thus has discretion not to seek habitual-offender sentence enhancement. It is clear that the Legislature wanted to ensure that an offender violating SORA a second time would be subject to a maximum sentence of not less than 7 years, while vesting in the sentencing court and the prosecution discretion that could result in a maximum sentence of up to 10.5 years.

fender.[46] The Court of Appeals panel in *Bewersdorf*, much like the Court of Appeals panel in this case, vacated Bewersdorf's habitual-offender sentence enhancement, concluding that the two statutes stood in conflict and therefore the more specific sentencing scheme applicable to OUIL offenses under the Michigan Vehicle Code "prevail[ed] to the exclusion of the general habitual-offender statute."[47]

This Court reversed in part, concluding that while the HOA establishes a procedure for enhancing a sentence, it is clear that the OUIL provisions of the Michigan Vehicle Code established separate crimes.[48] We rejected the Court of Appeals' "forced construction that placed the two statutes in conflict," holding that the two statutes could be read to "dovetail harmoniously," thereby concluding that Bewersdorf's OUIL-3 conviction was subject to the habitual-offender provisions of the HOA.[49]

The statutory scheme in SORA, MCL 28.729(1), is similar to that currently establishing the OWI offenses (previously known as OUIL) in the Michigan Vehicle Code, MCL 257.625(9)(a) to (c). Both schemes establish three separate crimes, stating in the prefatory language that a violation will be punished as stated in the subparts and then creating a first offense, second offense, and third or subsequent offense.

Just as *Bewersdorf* held that "OUIL-3 is a separate

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[46] *Bewersdorf*, 438 Mich at 60. At the time, OUIL-3 was prohibited by MCL 257.625(6), as amended by 1987 PA 109, and punishable under MCL 257.902 as a 5-year felony. The offense is now operating a motor vehicle while intoxicated (OWI) and is a 5-year felony prohibited by MCL 257.625(9)(c).

[47] *People v Bewersdorf*, 181 Mich App 430, 433; 450 NW2d 271 (1989), aff'd in part and rev'd in part 438 Mich 55 (1991).

[48] *Bewersdorf*, 438 Mich at 68.

[49] *Id*. at 69-70 (quotation marks and citation omitted).

crime" from other OUIL offenses, the same is true of SORA.[50] MCL 257.625(9) currently creates three separate crimes under Subdivision (a) (first offense), Subdivision (b) (second offense if committed within 7 years of a prior conviction), and Subdivision (c) (third or subsequent offense), and MCL 28.729(1) creates three separate crimes under Subdivision (a) (first offense), Subdivision (b) (second offense), and Subdivision (c) (third or subsequent offense). This is likewise true of other statutory schemes of commonly charged offenses, such as domestic violence, MCL 750.81(2) to (4). In addition, our reasoning is consistent with other Court of Appeals cases that have addressed this issue.[51]

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[50] *Id*. at 68. The OUIL provisions at issue in *Bewersdorf* differ from the SORA provisions in that the underlying offenses in *Bewersdorf* were misdemeanors and SORA-1, SORA-2, and SORA-3 are all felonies. Defendant complains that his sentence is inappropriate because his SORA-1 conviction was used to support his SORA-2 conviction and as the predicate to enhance his sentence as a second-offense habitual offender. While defendant objects to this, he offers no statutory or legal analysis to support the contention that his claimed double enhancement is inappropriate. The critical point from *Bewersdorf* is that the OUIL provisions increased the punishment for each repeated offense, just as the SORA provisions do in the present case. In fact, defendant concedes that there is no error in enhancing a SORA-2 sentence under the habitual-offender provisions as long as the habitual-offender enhancement is based on a felony other than a SORA violation. Thus, to this extent, defendant agrees with our conclusion that MCL 28.729(1) sets forth separate, elevated offenses.

[51] E.g., *People v Eilola*, 179 Mich App 315, 325; 445 NW2d 490 (1989) (holding that the habitual-offender provisions could be used to enhance a sentence for a conviction that constituted first-degree retail fraud because of a prior conviction, MCL 750.356c(2), as added by 1988 PA 20); *People v Brown*, 186 Mich App 350, 357; 463 NW2d 491 (1990) (reaffirming *Eilola* and extending it by holding that the sentence could be enhanced using the same conviction used to elevate the offense (answering a question left open in *Eilola*)); *People v James*, 191 Mich App 480, 481-482; 479 NW2d 16 (1991) (holding that the habitual-offender statutes and the statute imposing a mandatory minimum 5-year sentence for a second offense of criminal sexual conduct may be concur-

Pursuant to the statutory analysis discussed earlier in this opinion, we conclude that the Legislature intended in enacting SORA-2 and SORA-3 to elevate each offense, not merely the punishment. Thus, Michigan caselaw also supports our conclusion that a trial court can sentence defendant under SORA-2 as a second-offense habitual offender using his SORA-1 conviction.

IV. CONCLUSION

We conclude that MCL 28.729(1) sets forth a recidivism statutory scheme that creates three separate felonies that elevate on the basis of repeat offenses. We further conclude that a SORA-2 sentence for recidivist behavior may be elevated under the second-offense

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rently applied); *People v Lynch*, 199 Mich App 422, 423-424; 502 NW2d 345 (1993) (relying on *Eilola* and *Bewersdorf* and citing *Brown* to hold that the habitual-offender provision could enhance a sentence for a recidivist conviction of fleeing and eluding). See also *People v Fetterley*, 229 Mich App 511, 540-541; 583 NW2d 199 (1998) ("[W]here a defendant commits a controlled substances offense, but is not subject to the enhancement provisions of the Public Health Code because, although the defendant is an habitual offender, there are no prior controlled substance offenses, enhancement under the habitual offender provisions is permitted. Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is [sic] permitted.") (citations omitted). But cf. *People v Honeycutt*, 163 Mich App 757, 760-763; 415 NW2d 12 (1987), in which the Court concluded that when a defendant has been convicted of felony-firearm (and the requisite underlying felony) and also found to be an habitual offender, the trial court must impose the mandatory two-year sentence for the felony-firearm conviction without enhancement by the HOA and then impose a sentence on the underlying felony with enhancement by the HOA, with the second sentence running consecutively to the felony-firearm sentence. While the felony-firearm statute creates a crime separate and distinct from the underlying felony, the felony-firearm statute mandates the imposition of a mandatory, determinate sentence, which would necessarily conflict with a trial court's discretion to impose an indeterminate sentence under the HOA. *Id*. at 760.

habitual-offender statute, MCL 769.10(1)(a). Accordingly, the trial court appropriately exercised its discretion when it sentenced defendant to a 10.5-year maximum term of imprisonment. The Court of Appeals erred when it vacated defendant's sentence and wrongly concluded that MCL 769.10 and MCL 28.729 conflict and that, as a result, defendant could only be sentenced to the 7-year maximum set forth in MCL 28.729(1)(b).

We reverse the judgment of the Court of Appeals, remand the case to the Ionia Circuit Court, and direct that court to reinstate defendant's original judgment of sentence of 2 to 10.5 years as a second-offense habitual offender for a second offense of failing to comply with the SORA reporting requirements, MCL 28.729(1)(b). Pursuant to MCR 7.315(C)(3), the Clerk of the Court is directed to issue the judgment order forthwith.

YOUNG, C.J., and MARKMAN, MCCORMACK, and LARSEN, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring in the result only*). I agree with the majority's conclusion that defendant's conviction of failing to comply with the Sex Offenders Registration Act (SORA),[1] second offense, under MCL 28.729(1)(b) (SORA-2), is subject to sentence enhancement under the second-offense habitual-offender provision, MCL 769.10(1)(a). I would, however, reach that conclusion on more limited grounds and therefore concur in the majority's result only.

The Court of Appeals held that the trial court erred by sentencing defendant as a second-offense habitual offender to a 10.5-year maximum for his SORA-2 conviction solely on the basis of his prior conviction

[1] MCL 28.721 *et seq*.

under MCL 28.729(1)(a) (SORA-1).[2] In so doing, the Court of Appeals concluded, among other things, that MCL 28.729(1), which delineates SORA-1, SORA-2, and SORA-3,[3] sets forth one offense with escalating punishments for repeat convictions.[4] Before this Court, the prosecution argued: (1) that SORA-1, SORA-2, and SORA-3 are separate and distinct chargeable offenses—not one offense with escalating punishments as the Court of Appeals held; and (2) that nothing precluded the trial court from using defendant's prior conviction of SORA-1 to both support his SORA-2 conviction and enhance his sentence as a second-offense habitual offender.

The majority spends a significant portion of the opinion discussing the prosecution's first argument—i.e., whether SORA-2 is a separate felony subject to habitual-offender enhancement. However, I see no need to do so because defendant conceded that point before this Court by admitting that habitual-offender enhancement of a SORA-2 sentence is permissible in certain circumstances.[5] And in conceding the issue, defendant provided no briefing on it, leaving this Court

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[2] *People v Allen*, 310 Mich App 328, 349; 872 NW2d 21 (2015).

[3] MCL 28.729(1)(c).

[4] *Allen*, 310 Mich App at 350.

[5] Defendant's brief on appeal states, "In other words, had some other prior felony conviction (other than the previous conviction for Failing to Comply with SORA) been used to charge Mr. Allen as a 2nd Felony Habitual Offender, he could have been sentenced to a maximum of 10.5 years." Defendant's brief further states:

> Admittedly, the prosecution's arguments have some validity under certain circumstances. If the prosecution had relied upon a different prior (underlying) felony conviction, aside from the prior failure to comply with SORA (which elevated both the underlying offense to a 2nd offense and the sentence maximum from four years to seven years . . .), then the prosecution would have a valid argument.

without a full discussion of the arguments that may run counter to the prosecution's position.[6] In light of this lack of briefing, I would leave open for another day the question whether MCL 28.729(1) creates separate offenses or only one offense with escalating punishments and instead rely on defendant's concession to hold that, for the purposes of this case only, SORA-2 constitutes a separate felony offense subject to habitual-offender enhancement.

Given defendant's concession regarding the prosecution's first argument, we need only answer whether defendant's SORA-1 conviction can be used as support for both convicting him of SORA-2 and enhancing his sentence as a second-offense habitual offender. While I

[6] For example, a reasonable argument can be made that even though the sentencing guidelines suggest that SORA-1, SORA-2, and SORA-3 are separate offenses, the plain language of MCL 28.729(1) indicates that they are nothing more than provisions for increased punishments. See *People v Fetterley*, 229 Mich App 511, 540-541; 583 NW2d 199 (1998) ("Where the legislative scheme pertaining to the underlying offenses elevates the offense, *rather than enhances the punishment*, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted.") (emphasis added). There is also an interesting distinction between MCL 28.729(1) and the statutes at issue in *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991). SORA-1, SORA-2, and SORA-3 are all felonies with only increased punishment as their distinctions, whereas the drunk-driving provisions at issue in *Bewersdorf* escalated the severity of the offense from a 90-day misdemeanor, to a one-year misdemeanor, to a felony. *Id*. at 64, 71. Finally, a plausible argument may be made that SORA is a standalone act not subject to habitual-offender enhancement. See *People v Edmonds*, 93 Mich App 129, 135; 285 NW2d 802 (1979) ("As such, [the former Controlled Substances Act, former MCL 335.301 *et seq*.] represents this state's comprehensive policy toward the use of controlled substances. As a specific and comprehensive measure the act's sentence-augmentation provision controls over the general habitual offender statute."); see also *People v Honeycutt*, 163 Mich App 757, 761-762; 415 NW2d 12 (1987).

am troubled by the prosecution's ability to do so, I nonetheless agree with the majority's conclusion that it is permissible in this case. Nothing in the plain language of MCL 28.729 or MCL 769.10 prohibits the prosecution or the court from using defendant's SORA-1 conviction to support a double enhancement. And in this area of the law, the Legislature's silence is significant since, as the majority recognizes, the Legislature has clearly demonstrated that it knows how to exclude certain offenses from habitual-offender enhancement.[7] First, in the habitual-offender provisions, the Legislature has excluded habitual-offender enhancement of subsequent felonies that are major controlled substance offenses.[8] Second, in various acts throughout our statutory scheme, the Legislature has precluded use of the same prior conviction for double enhancement.[9] However, even though the Legislature knows how to do so, it chose not to exclude convictions under MCL 28.729(1) from double enhancement. Therefore, assuming for this case only that SORA-2 is a separate offense, I agree with the majority that nothing precludes the trial court from using defendant's SORA-1 conviction to both support his SORA-2 conviction and enhance his sentence as a second-offense habitual offender.[10]

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[7] *Ante* at 317-318.

[8] See, e.g., MCL 769.10(1)(c) ("If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461.").

[9] For example, MCL 750.356c(6), which pertains to first-degree retail fraud, reads, "If the sentence for a conviction under this section is enhanced by 1 or more prior convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant to [the habitual-offender statutes]." See also *ante* at 317.

[10] See *People v Miller*, 498 Mich 13, 24-25; 869 NW2d 204 (2015).

Accordingly, I agree that the trial court did not err when it sentenced defendant as a second-offense habitual offender to a 10.5-year maximum sentence for his SORA-2 conviction. However, I would limit that holding to this case for the reasons stated here and not decide whether SORA-2 is a separate offense subject to habitual-offender enhancement because the issue was conceded by defendant. Thus, I concur in the result only.

BERNSTEIN, J., concurred with VIVIANO, J.

PEOPLE v HARRIS

PEOPLE v LITTLE

PEOPLE v HUGHES

Docket Nos. 149872, 149873, and 150042. Argued November 4, 2015 (Calendar No. 2). Decided June 22, 2016.

Nevin Hughes, a Detroit police officer, assaulted a person while on duty. The victim filed a complaint, resulting in an internal investigation by the Detroit Police Department's Office of the Chief Investigator (OCI). Hughes made statements during the investigation, under the threat of dismissal from his job, in which he denied the allegations. After a video recording of the incident came to light, Hughes was charged in the 36th District Court with felony misconduct in office, misdemeanor assault and battery, and obstruction of justice. Two other Detroit police officers, Sean Harris and William Little, who had been standing nearby during the incident and had made statements denying the allegations against Hughes during the OCI investigation under the threat of dismissal from their jobs, were also charged in the 36th District Court with obstruction of justice. The court, Katherine L. Hansen, J., relying on the Fifth Amendment of the United States Constitution and the disclosures by law enforcement officers act (DLEOA), MCL 15.391 *et seq*. (which states that an involuntary statement made by a law enforcement officer, and any information derived from that statement, may not be used against the officer in a criminal proceeding), determined that defendants' statements during the investigation could not be used against them. Because the obstruction-of-justice charges could not be sustained without using defendants' statements, the court dismissed those charges. The prosecution appealed. The Wayne Circuit Court, Bruce U. Morrow, J., affirmed the dismissal of the obstruction-of-justice charges. The Court of Appeals granted applications by the prosecution for leave to appeal with regard to each defendant and consolidated the appeals. The Court of Appeals, METER, P.J., and JANSEN, J. (WILDER, J., concurring in part and dissenting in part), reversed and remanded the cases to the district court for reinstatement of the obstruction-of-justice charges, concluding that neither the Fifth Amendment nor the

DLEOA barred the use of defendants' false statements in the criminal proceedings. *People v Hughes*, 306 Mich App 116 (2014). The Supreme Court granted defendants' applications for leave to appeal. *People v Harris*, 497 Mich 958 (2015).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court *held*:

Under the DLEOA, any information provided by a law enforcement officer, if compelled under threat of any employment sanction by the officer's employer, cannot be used against the officer in subsequent criminal proceedings. The act does not distinguish between true and false statements. Therefore, even if false, the officer's statements cannot be used against the officer in a subsequent prosecution.

1. In *People v Allen*, 15 Mich App 387 (1968), the Court of Appeals held that the Fifth and Fourteenth Amendments' benefits of freedom from a coerced waiver of the right to remain silent had to be respected even in a subsequent perjury prosecution. But as the Court of Appeals correctly observed, after *Allen* was decided, Michigan caselaw failed to keep pace with federal developments in this area of the law, including United States Supreme Court decisions clarifying that the Fifth Amendment only applies to truthful statements. Accordingly, the Court of Appeals repudiated its prior decision in *Allen* and held that the Fifth Amendment did not bar the use of defendants' false statements. The parties did not challenge the repudiation of *Allen* on appeal in the Michigan Supreme Court and, given the developments in the law in the time since *Allen* was decided, there was no reason to disturb that repudiation.

2. MCL 15.393 states that an involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding. MCL 15.391(a) defines the term "involuntary statement" as information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer. The Legislature chose to use broad language in the DLEOA. The act does not expressly limit its protections to true statements, nor does it contain any express exception for perjury, lying, providing misinformation, or similar dishonesty. The word "information" does not connote only truthful information. In common usage, the word "information" is regularly used in conjunction with adjectives suggesting "information" may be true or false. The Court of

Appeals erred when it concluded that the Legislature, by merely using the word "information," intended to impose an inherent requirement of veracity for involuntary statements to be covered under the DLEOA. Examination of the Legislature's use of "information" in other statutes leaves no doubt that in the DLEOA the unmodified term is properly construed to apply to all "information," whether true or false. Several statutes related to immunity and compulsory statements refer to "truthful information." The presence of the word "truthful" in these statutes is linked to this Court's ruling in *People v McIntire*, 461 Mich 147 (1999). At issue in *McIntire* was the proper interpretation of transactional immunity for witnesses compelled to answer potentially incriminating questions under MCL 767.6. In light of the statute's plain language at the time, the *McIntire* Court rejected the notion that a grant of immunity under MCL 767.6 extended only to truthful answers, reasoning that the text of the statute was clear and unambiguous and did not condition immunity on truthful testimony. The Legislature subsequently amended MCL 767.6 and other statutes to add "truthful" to terms such as "testimony" and "information" when the Legislature sought to add that limitation. The Legislature clearly knows how to limit information based on its veracity when such a limitation is important to conveying the Legislature's intent, but it chose not to do so in the DLEOA. Given the plain language of the act, the Legislature intended the word "information," as used in MCL 15.391, to include no inherent requirement of veracity, but instead to include statements that may be true or false.

3. Applying this interpretation of the DLEOA's plain language, the obstruction-of-justice charges brought against defendants had to be dismissed. Defendants provided statements regarding their encounter with the victim under threat of termination; these statements, though false, were protected by the DLEOA and, therefore, could not be used against defendants in a criminal proceeding. There was no dispute that defendants' statements provided the only basis for charging them with obstruction of justice and that the charges had to be dismissed if the officers' statements were inadmissible. While the result might be unpalatable, the Court could not substitute its own policy judgment in the face of the text of the statute.

Court of Appeals judgment reversed to the extent it held that under the DLEOA a law enforcement officer's involuntary statement could be used against the officer in a criminal proceeding if

the statement was false. District court orders dismissing the obstruction-of-justice charges brought against defendants reinstated.

Justice MARKMAN, joined by Justice VIVIANO, concurring in part and dissenting in part, agreed with the majority opinion to the extent it held that the Fifth Amendment does not preclude the use of false statements by a law enforcement officer in a prosecution for obstruction of justice, but disagreed with it to the extent it held that the DLEOA precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice. That is, contrary to the majority, Justice MARKMAN agreed with the Court of Appeals that false statements do not constitute "information" and therefore are not protected by the DLEOA. Lies do not constitute "information" as that term is commonly defined and understood. "Information" is commonly defined as knowledge. Lies do not impart knowledge. Indeed, one becomes increasingly less informed as a result of lies. A number of Michigan statutes refer to "inaccurate" or "misleading" information, supporting the Court of Appeals majority's conclusion that "information" signifies truthful information because in those unusual circumstances in which the Legislature is intending to refer to untruthful information, the Legislature recognizes that it needs to supply a modifier to precede "information" because, when unmodified, "information" signifies truthful information. Although the Legislature added "truthful" before "information" in a handful of statutes in the wake of *McIntire*, the Legislature likely did not believe it needed to add "truthful" before "information" when it enacted the DLEOA seven years later because (a) the DLEOA was viewed as a codification of United States Supreme Court decisions, which held that the Fifth Amendment did not protect false statements, and (b) the Legislature almost certainly perceived the word "information" as only connoting truthful information and simply did not feel obligated in perpetuity to add "truthful" every time it used the word "information." Nothing within *McIntire* can be read to suggest that false statements constitute "information." Rather, what most obviously can be drawn from the Legislature's response to *McIntire* is that *McIntire*'s equivalent treatment of truthful and false statements was squarely repudiated, an equivalency that is exactly repeated in the majority's interpretation in the instant case. Additionally, MCL 15.391 defines the term "involuntary statement" as information provided by a law enforcement officer, if compelled. Not only are lies not "information," but they are also not "compelled." That is why the Fifth Amendment prohibition against compelled self-incrimination does not protect perjury. The government did

not compel defendants to lie; it sought only to "compel" defendants to tell the truth. That defendants chose to provide exculpatory falsehoods, rather than inculpatory truths, resulted in their loss of protection under the Fifth Amendment and the DLEOA. Moreover, the DLEOA is based on an obvious theory of quid pro quo: police officers provide information to the government about police misconduct, and in exchange the government agrees not to use the information against the officers. However, when the officers proceed to lie to the government, the government is deprived of that to which it was entitled in exchange for the grant of immunity—information. No Legislature, and no legislator, could conceivably have intended such a result. Construing the DLEOA in light of its purpose—assisting in the discovery of police misconduct—strongly supports the conclusion that "information" presupposes "truthful information." Simply put, there is no reason to enact an immunity statute if it cannot produce "information" that is helpful in uncovering police misconduct. Justice MARKMAN would have affirmed the judgment of the Court of Appeals.

CRIMINAL LAW — EVIDENCE — POLICE OFFICERS' INVOLUNTARY STATEMENTS.

Under the disclosures by law enforcement officers act, an involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding; the act, in MCL 15.391(a), defines the term "involuntary statement" as information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer; as used in MCL 15.391(a), the word "information" includes no inherent requirement of veracity, and even if false, an officer's statement may not be used against the officer in a criminal proceeding (MCL 15.391 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Steven Fishman and *Pamella Szydlak* for Sean Harris and William Little.

Goldpaugh & Associates, PC (by *John J. Goldpaugh*), for Nevin Hughes.

Amici Curiae:

Douglas M. Gutscher and *Frank A. Guido* for the Police Officers Association of Michigan.

Thomas R. Zulch, *Brendan J. Canfield*, and *Megan Boelstler* for the Police Officers Labor Council.

ZAHRA, J. In these three consolidated cases, we address the difficult question of whether defendants' false statements made while serving as law enforcement officers during an internal affairs investigation can be used against them in criminal proceedings. We conclude that under the disclosures by law enforcement officers act (DLEOA), MCL 15.391 *et seq*., false or inaccurate information cannot be used against a law enforcement officer in subsequent criminal proceedings. To hold otherwise would defeat the Legislature's stated intent to preclude the use of "any information," MCL 15.393, a law enforcement officer is compelled to provide "under threat of . . . any . . . employment sanction,"[1] MCL 15.391(a). And while we agree with the Court of Appeals that the Fifth Amendment of the

[1] The DLEOA does not provide law enforcement officers with immunity. It only prevents a law enforcement officer's "involuntary" statements from being used against the officer in a criminal prosecution. MCL 15.391(a); MCL 15.393. A law enforcement officer may be prosecuted for criminal conduct based on evidence other than involuntary statements provided by the officer during an internal inquiry. In the present cases, defendant Hughes is subject to charges independent of the obstruction-of-justice charge that stems from his statement. And while we express no opinion regarding the validity of other charges that could have been asserted against defendants Harris and Little, we note that the Michigan Legislature has made it unlawful for a public official to willfully neglect one's duty. MCL 750.478.

United States Constitution as interpreted in *Garrity v New Jersey*[2] does not compel this result, states may provide protections greater than those secured under the United States Constitution, and that is exactly what the Michigan Legislature did when it enacted the DLEOA in 2006. Simply stated, the DLEOA bars the use in a subsequent criminal proceeding of all information provided by a law enforcement officer under threat of any employment sanction. The act does not distinguish between true and false statements. Although the Legislature is free to amend the DLEOA to change the policy enacted, we are not. No matter how we view the policy, we must follow the language chosen by the Legislature. We reverse the judgment of the Court of Appeals and reinstate the orders of dismissal entered in the district court.

I. BASIC FACTS AND PROCEEDINGS

This case arises out of a disturbing encounter between Dajuan Hodges-Lamar and defendants, who at the time were police officers for the city of Detroit. While on duty in November 2009, defendant Hughes approached Hodges-Lamar while he was seated in a car at a gas station. Hughes initially appeared to question Hodges-Lamar, but quickly proceeded to assault him while defendants Harris and Little, who were also on duty, stood by and did nothing to stop the

[2] The Supreme Court of the United States held in *Garrity v New Jersey*, 385 US 493, 500; 87 S Ct 616; 17 L Ed 2d 562 (1967), that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office . . . ." A hearing in which a law enforcement officer is called on to make a statement under threat of an employment sanction has become known as a "*Garrity* hearing," and the statement provided under that threat, a "*Garrity* statement." It was at a *Garrity* hearing that each defendant provided the *Garrity* statements that led to the common-law obstruction-of-justice charges at issue here.

assault. Hodges-Lamar filed a complaint with the Detroit Police Department, which spurred an internal investigation by the Detroit Police Department's Office of the Chief Investigator (OCI). All three defendants were called to testify at a *Garrity* hearing.

The OCI presented defendants with an advice-of-rights form drafted by the Detroit Police Department. In relevant part, the form broadly stated:

> 4. If I refuse . . . to answer questions . . . I will be subject to departmental charges which could result in my dismissal from the police department.
>
> 5. If I do answer . . . neither my statements or any information or evidence which is gained by reason of such statements can be used against my [sic] in any subsequent criminal proceeding.

The language of this form, like the language of DLEOA, did not expressly require truthful answers or truthful statements.[3] Defendants also received a reservation-of-rights form drafted by the Detroit Police Department, which provided, in relevant part, as follows:

> It is my belief . . . that this Statement and the Preliminary Complaint Report will not and cannot be used against me in any subsequent proceedings other than disciplinary proceedings within the confines of the Department itself. For any and all other purposes, I hereby reserve my Constitutional rights to remain silent under the **FIFTH** and **FOURTEENTH AMMENDMENTS** [sic] to the **UNITED STATES CONSTITUTION**, and Article I, Section 17 **of the MICHIGAN CONSTITUTION**.

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[3] Recognizing that the rights granted defendants by the Detroit Police Department in its advice-of-rights form are extremely broad, this Court asked the parties to brief a question not previously raised by either party: "whether the [advice-of-rights form] signed by the defendants bar[s] the use of their statements in a criminal prosecution as violative of state or federal rights against self-incrimination." *People v Harris*, 497 Mich 958 (2015). We need not address this issue because the case is fully resolved under the DLEOA.

All three defendants made false statements at the *Garrity* hearing. Defendants Harris and Little denied that Hughes had any physical contact with Hodges-Lamar. Hughes admitted that he removed Hodges-Lamar from Hodges-Lamar's car during questioning, but Hughes maintained that he did not use any unnecessary force against Hodges-Lamar. A video recording of the incident surfaced after defendants had made their statements. The video recording was provided to the OCI.[4]

The video recording is wholly at odds with the statements provided by defendants. The prosecutor charged Hughes with common-law felony misconduct in office, MCL 750.505, misdemeanor assault and battery, MCL 750.81, and obstruction of justice, also under MCL 750.505. Defendants Harris and Little were each charged with one count of common-law obstruction of justice, MCL 750.505. The obstruction-of-justice charges were based on allegations that the officers lied during the initial investigation.

Defendants brought motions in district court to dismiss the obstruction-of-justice charges.[5] The district

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[4] The video showed defendant Hughes approach Hodges-Lamar's vehicle while defendants Harris and Little assumed positions at the rear of the vehicle and the passenger door. Hughes pulled Hodges-Lamar out of the vehicle by his collar, slammed him against the car, and searched him. Meanwhile, Harris and Little had moved closer to Hughes and Hodges-Lamar. Hughes pushed Hodges-Lamar toward Harris and Little. Finally, Hughes can be seen striking Hodges-Lamar with an open hand in the throat, punching him again, pushing him to the ground, picking him up by the collar several times, slamming him onto the car, and pushing him back toward Harris and Little. Afterward, Hodges-Lamar was issued a citation for driving without proof of insurance.

[5] Defendant Hughes did not challenge the bindover regarding his common-law felony misconduct in office and misdemeanor assault and battery charges. As a result, those charges are not at issue on appeal.

court concluded that defendants' statements were protected by the DLEOA, even if the information provided was false or misleading. The court determined that without defendants' statements the obstruction-of-justice charges could not be sustained and dismissed those charges. The prosecution appealed in the circuit court, which concluded that the district court had not abused its discretion by dismissing the obstruction-of-justice charges.

The prosecution filed applications for leave to appeal in the Court of Appeals with regard to all three defendants. In a published opinion, a divided panel reversed the lower courts and reinstated the obstruction-of-justice charges.[6] The majority recognized that its holding conflicted with *People v Allen*,[7] which held that "the Fifth and Fourteenth Amendments' benefits of freedom from [a] coerced waiver of the right to remain silent . . . must be respected," even in a subsequent perjury prosecution. After noting that *Allen* was not binding precedent under MCR 7.215(J)(1), the majority concluded that "in light of the post-*Garrity* caselaw permitting a witness's statements to be used against him or her in a subsequent criminal prosecution for a collateral offense such as perjury or obstruction of justice, we expressly disavow *Allen*'s reasoning."[8] The majority further concluded that "[t]he district court . . . abused its discretion by excluding defendants' false statements under MCL 15.393 . . . ."[9] The majority reasoned that "the statute internally limits the phrase 'involuntary statement' to

[6] *People v Hughes*, 306 Mich App 116; 855 NW2d 209 (2014).

[7] *People v Allen*, 15 Mich App 387, 396; 166 NW2d 664 (1968).

[8] *Hughes*, 306 Mich App at 128.

[9] *Id*.

include true statements only, and that false statements and lies therefore fall outside the scope of the statute's protection."[10]

Judge WILDER dissented from the majority's determination that false statements fall outside the DLEOA's scope of protection. Relying on the plain meaning of the words of the act, Judge WILDER reasoned that the protection granted law enforcement officers under the DLEOA applies to all information garnered from an officer during a compulsory internal police investigation.

Defendants filed separate applications for leave to appeal in this Court, each arguing that the Court of Appeals majority erred by concluding that the DLEOA's scope of protection did not encompass defendants' false statements. On February 4, 2015, we granted the applications, directing the parties to brief "whether the Disclosures by Law Enforcement Officers Act, MCL 15.391, *et seq*., precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice[.]"[11]

II. STANDARD OF REVIEW

We review de novo constitutional issues and matters of statutory interpretation.[12]

III. ANALYSIS

We must determine whether Michigan law provides these defendants with more protections than those provided under the Fifth Amendment of the United

[10] *Id*. at 129.

[11] *Harris*, 497 Mich 958.

[12] *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014).

States Constitution.[13] While we touch on the constitutional right against self-incrimination found in the Fifth Amendment and the corresponding provision of the Michigan Constitution, this case does not turn on those constitutional provisions. Defendants do not maintain the protection they seek comes from *Garrity* or its progeny under federal or Michigan caselaw.[14] Rather, defendants argue that the Legislature, in enacting the DLEOA, chose to afford law enforcement officers greater protection than that available under the Fifth Amendment and that this statutory protection requires dismissal of the obstruction-of-justice charges brought against them. This protection, defendants argue, is found in the plain language of the DLEOA, specifically MCL 15.393, which provides:

> An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.

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[13] See *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964), which applied the Fifth Amendment protection against self-incrimination to the states through the Fourteenth Amendment.

[14] Many cases have developed *Garrity* into the rule as it is understood today. As is particularly relevant to this opinion, the Supreme Court of the United States has clarified, since *Garrity*, that its interpretation of the Fifth Amendment only applies to truthful statements. See, e.g., *United States v Wong*, 431 US 174; 97 S Ct 1823; 52 L Ed 2d 231 (1977); *United States v Apfelbaum*, 445 US 115; 100 S Ct 948; 63 L Ed 2d 250 (1980).

As the Court of Appeals correctly observed, however, Michigan caselaw has not expressly kept pace with this federal development of the *Garrity* rule. The last published authority on the topic came from *Allen*, 15 Mich App 387, which concluded that *Garrity* applies to false statements; *Allen* was not directly repudiated by a Michigan court until the Court of Appeals' opinion in this case. The parties do not challenge this repudiation, and, given the developments in *Garrity* jurisprudence in the time since *Allen* was issued, we see no reason to disturb it.

The DLEOA defines the term "involuntary statement" as follows:

> "Involuntary statement" means information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer.[15]

The prosecution argues this language does not preclude the use in later criminal proceedings of false or misleading information obtained through a *Garrity* hearing. The prosecution characterizes the language as nothing more than a codification of the *Garrity* rule as it has been developed through federal caselaw. Thus, the prosecution argues that the DLEOA only provides the protection afforded under the Fifth Amendment. Because the Supreme Court of the United States has made it clear that the Fifth Amendment grants a privilege to remain silent without consequence, but "does not endow the person who testifies with a license to commit perjury,"[16] the prosecution maintains that the DLEOA does not protect from subsequent criminal prosecution a law enforcement officer who provides false or misleading statements in a *Garrity* hearing.

The plain language of the DLEOA controls our resolution of this dispute and compels us to agree with defendants. Applying traditional principles of statutory construction to the language of the DLEOA, we must conclude that the act sweeps within its scope the false statements offered by defendants. While we may question the Legislature's decision to offer such unqualified protections, we are obligated to respect that

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[15] MCL 15.391(a).

[16] *Wong*, 431 US at 178 (citation and quotation marks omitted).

decision and interpret the statute in accordance with its plain language.

A. THE DLEOA'S PROTECTIONS REACH BOTH TRUE AND FALSE STATEMENTS

Our primary focus in this case—and all cases in which we are called upon to interpret a statute—is the language of the statute under review. The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature.[17] Our role as members of the judiciary is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result. In fact, a "clear and unambiguous statute leaves no room for judicial construction or interpretation."[18] Therefore, we start by examining the words of the statute, which "should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute."[19]

The Legislature chose to use broad language in the DLEOA. The act prohibits any information derived from an involuntary statement from being used against the officer in a criminal proceeding[20] and also prohibits public access to and disclosure of an involuntary statement, except under certain statutorily enumerated circumstances.[21] The act does not expressly limit the statute's protections to true statements, nor does it contain any express exception for perjury, lying, providing misinformation, or similar dishonesty. In contrast, numerous statutes concerning the use of

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[17] *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979).

[18] *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

[19] *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012).

[20] MCL 15.393.

[21] MCL 15.395.

compelled testimony contain express exceptions to allow the use of such dishonest testimony for impeachment purposes and in prosecutions for perjury.[22] The Court of Appeals inferred the existence of such a limitation in the DLEOA from the Legislature's use of the term "information." While we agree that "information" comprises statements that are true, the word does not exclude statements that are false.

The word "information" is not defined in the statute, but dictionaries define the word broadly as "knowledge communicated or received concerning a particular fact or circumstance";[23] "[k]nowledge or facts communicated about a particular subject, event, etc.; intelligence, news";[24] and "the communication or reception of knowledge or intelligence[.]"[25] The dissent focuses its attention on "knowledge," but "intelligence" and "news," both of which are used in dictionaries to describe "information," can be false.[26] Even "knowledge" can be defined to include "the sum of what is known,"[27] which does not foreclose the possibility of including something that is false.

We may even conclude that "knowledge" in its primary sense encompasses something that is true. But the *statute* nowhere uses the term "knowledge." Instead, it protects "statements," which no one disputes may be false and are statutorily defined as "information." The critical inquiry is not whether "knowledge"

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[22] See, e.g., MCL 780.702(3); MCL 750.157; MCL 750.453.

[23] *Random House Webster's College Dictionary* (2003).

[24] 1 *Shorter Oxford English Dictionary* (6th ed).

[25] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[26] See *Random House Webster's College Dictionary* (2003) (defining "intelligence" as "information received or imparted; news" and defining "news" as "a report of a recent event; information").

[27] *Id.*

equals "truth," but whether "information" connotes *only* truth. Dictionaries, which define "information" as "knowledge," "intelligence," or "news," do not yield a dispositive answer.

Keeping in mind that we must interpret the word "information" as used in the DLEOA "according to the common and approved usage of the language,"[28] we apply a tool that can aid in the discovery of "how particular words or phrases are actually used in written or spoken English."[29] The Corpus of Contemporary American English (COCA)[30] allows users to "analyze[] ordinary meaning through a method that is quantifiable and verifiable."[31]

The dissent claims that, in ordinary usage, "we should not think of someone who provided inaccurate statements as having imparted 'knowledge' or 'infor-

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[28] MCL 8.3a.

[29] *State v Rasabout*, 2015 Utah 72, ¶ 57; 356 P3d 1258 (2015) (LEE, A.C.J., concurring in part). Linguists call this type of analysis *corpus linguistics*, but the idea is consistent with how courts have understood statutory interpretation. For instance, the United States Supreme Court has looked to Westlaw and Lexis databases to examine how words are used in ordinary English when examining how Congress intended a particular word or phrase. See *Texas Dep't of Housing & Community Affairs v Inclusive Communities Project, Inc*, 576 US ___, ___; 135 S Ct 2507, 2534; 192 L Ed 2d 514 (2015) (ALITO, J., dissenting); *Muscarello v United States*, 524 US 125, 129; 118 S Ct 1911; 141 L Ed 2d 111 (1998).

[30] The Corpus of Contemporary American English contains over 520 million words from 220,225 texts, spread evenly among a 25-year period, 1990-2015. The texts include transcripts of live television broadcasts, newspapers, magazines, academic journals, and fiction. Corpus of Contemporary American English, *Texts* <https://corpus.byu.edu/coca/help/texts.asp> (accessed June 6, 2016) [https://perma.cc//E77D-97XR].

[31] Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 Colum Sci & Tech L Rev 156, 202 (2012).

mation' . . . ."[32] Empirical data from the COCA, however, demonstrates the opposite. In common usage, "information" is regularly used in conjunction with adjectives suggesting it may be both true and false.[33] This strongly suggests that the unmodified word "information" can describe *either* true or false statements. Moreover, by reading each identified use of the word "information" in its surrounding context,[34] it is clear that "information" is often used to describe false statements.[35] Quite simply, "information" in common parlance describes perceptions conveyed about the world around us, which may be true or false.[36]

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[32] *Post* at 366.

[33] In conducting a COCA search, the word "accurate" is the most common adjective collocated with "information" to bear a meaning that refers to truth or falsity. The words "false" and "inaccurate" are also commonly collocated with "information." The collocation search for "information" is available at Corpus of Contemporary American English, "*Information*" *Frequency* <http://corpus.byu.edu/coca/?c=coc&q=47913597> (accessed June 6, 2016).

[34] *See Hard Cases and Hard Data*, 13 Colum Sci & Tech L Rev at 197. This is known as a concordance search. After running a collocation search, a user can retrieve the results of a concordance search by navigating to a collocated word and examining each listing in its full context.

[35] For example, news stories from 2006—the year the Legislature enacted the DLEOA—describe "heightened publicity about false information on" the Internet and market analysts "who say they witnessed fellow employees allowing hedge fund clients . . . to add false or misleading information" to investment reports. Hafner, *Growing Wikipedia Refines Its 'Anyone Can Edit' Policy*, New York Times (June 17, 2006); Masters, *2 Firms Claim Conspiracy in Analyst Reports*, The Washington Post (April 26, 2006).

[36] The fact that "information" is often used without a modifying adjective to distinguish its veracity does not, as argued by the dissent, indicate that the word "information" connotes the conveyance of only truthful information. The absence of a modifying adjective around the word is immaterial; the word is used to describe perceptions about the world around us, which may be "true, false, and in-between." Schieffer,

The Court of Appeals failed to account for the breadth and scope of the word "information." We therefore cannot agree that the lay definitions of "information" exclude the falsehoods offered by defendants, or that the Legislature, by merely using that word, intended to impose an inherent requirement of veracity for involuntary statements to be covered under the DLEOA.[37]

To the contrary, examination of the Legislature's use of "information" in other statutes that existed at the time the DLEOA was enacted leaves no doubt that the unmodified term is properly construed to apply to *all* "information," whether true or false. In the years leading up to enactment of the DLEOA, the Legislature frequently modified the word "information" with the word "truthful" when it intended to reach only truthful information. Such an express limitation, found in a number of other statutes, including in statutes involving immunity or compelled statements,[38]

CBS News, *The Spread of Measles—And of Lies on the Internet* <http://www.cbsnews.com/news/the-spread-of-measles-and-of-lies-on-the-internet/> (posted February 8, 2015) (accessed June 6, 2016) [https://perma.cc/F4XK-9PAE].

[37] We see little interpretive import in comparing "information" with "misinformation" and, in light of the definitions discussed in this opinion, are inclined to agree with Judge WILDER's dissent that the latter is merely a subset of the former. Indeed, as already explained, a collocation and concordance search on COCA demonstrates that the word "information" is often modified by words connoting veracity, such as "accurate."

[38] In addition to MCL 780.702 and MCL 750.157, discussed subsequently in the main text of this opinion, see, e.g., MCL 750.453 ("Truthful testimony, evidence, or other truthful information compelled under this section and any information derived directly or indirectly from that truthful testimony, evidence, or other truthful information shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to testify or produce evidence as required."); MCL 29.7(4)

is not present here.[39] Of particular relevance is MCL 780.702(3), which governs orders granting

(expressly protecting only "truthful testimony" and "truthful information" from being used against a witness); MCL 780.702a(6) (stating that "truthful information" compelled under an order granting immunity may not be used against a witness); MCL 750.125(5) (expressly protecting "truthful information" from being used against a witness); MCL 750.122(2) (stating that paying a witness's reasonable costs to "testify truthfully or provide truthful information" is not a crime).

[39] See also MCL 333.17014 (stating that certain informed consent statutes are designed to provide "objective, truthful information"); MCL 400.111b(20) (requiring certain professionals to provide "truthful information" about their qualifications).

Other statutes do not modify the word "information" with "truthful," but still suggest that "information" has no inherent connotation of veracity. See, e.g., MCL 423.452(b) (denying a presumption of actions in good faith to employers who disclose employee information "with a reckless disregard for the truth"); MCL 380.1230b (same quoted language as MCL 423.452(b)); MCL 750.411s(8)(i) (" 'Post a message' means . . . communicating or attempting to . . . communicate information, whether truthful or untruthful, about the victim."); MCL 449.20 (requiring that "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability"); MCL 449.1305(2) (setting forth the right of limited partners to "[o]btain from the general partners, from time to time, upon reasonable demand . . . true and full information regarding the state of the business and financial condition of the limited partnership"); MCL 324.5507(1)(e) (requiring that a certain application be accompanied by a certification "stat[ing] that, based on information and belief formed after reasonable inquiry, the statements and information in the application are true, accurate, and complete"); MCL 460.1093(9) (requiring that a certain report "shall be accompanied by an affidavit from a knowledgeable official of the customer that the information in the report is true and correct to the best of the official's knowledge and belief").

Correspondingly, as Judge WILDER observed in dissent, the Legislature has frequently modified "information" with the adjectives "misleading" or "inaccurate" when the Legislature only intended to reach false information. See, e.g., MCL 769.34(10); MCL 750.492a(1); MCL 791.235(1)(b). We agree with Justice MARKMAN that the use of such modifiers in other statutes does not alone lead to the conclusion that the word "information," as used in the DLEOA, includes both true and false

immunity to witnesses. The statute expressly limits immunity to "[t]ruthful testimony or other *truthful information* compelled under the order granting immunity . . . ."[40] Although the statute was first enacted into law in 1968, its limitation of immunity to only truthful information was not present in the statute until 1999—seven years before the Legislature enacted the DLEOA.[41] Similarly, MCL 750.157 prevents certain compelled "[t]ruthful testimony, evidence, or other *truthful* information" from being used against the person "in a criminal case, except for impeachment purposes or in a prosecution for perjury . . . ."[42]

The presence of the word "truthful" in these statutes is linked to this Court's ruling in *People v McIntire*[43]—a 1999 opinion we find instructive and supportive of our analysis here. At issue in *McIntir*e was the proper interpretation of transactional immunity for witnesses compelled to answer potentially incriminating questions under MCL 767.6. The statute at the time provided, in relevant part, that "[n]o person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."[44] In light of this plain language, the *McIntire* Court rejected the notion that a grant of immunity under MCL 767.6 extended only to truthful answers, reasoning that the text of the statute was "clear and unambiguous" and "simply [did] not

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statements. But the Legislature's use of these modifiers elsewhere supports our understanding that the word "information" itself connotes nothing with respect to veracity.

[40] MCL 780.702(3) (emphasis added).

[41] Compare 1968 PA 289, § 2, with 1999 PA 249, § 2.

[42] Emphasis added.

[43] *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).

[44] MCL 767.6, as amended by 1951 PA 276.

condition . . . immunity on *truthful* testimony."[45] In so holding, this Court stressed that it was bound—as we are here—by "traditional principles of statutory construction," which require courts to "respect the constitutional role of the Legislature as the policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility."[46] The Legislature received this message and subsequently amended MCL 767.6 and other statutes accordingly, adding "truthful" to terms such as "testimony" and "information" when the Legislature sought to add that limitation.

The Legislature clearly knows how to limit information based on its veracity when such a limitation is important to conveying its intent. It did so in a number of other statutes it enacted or amended after *McIntire*, but it chose not to do so in the DLEOA, even though the Legislature had the benefit of *McIntire* when it enacted the DLEOA in 2006. We cannot overlook this choice or refuse to give it effect.[47] Accordingly, we conclude that

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[45] *McIntire*, 461 Mich at 154 (citation and quotation marks omitted).

[46] *Id.* at 153 (citation and quotation marks omitted).

[47] See, e.g., *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *Paselli v Utley*, 286 Mich 638, 643; 282 NW 849 (1938) ("This court cannot write into the statutes provisions that the legislature has not seen fit to enact.").

In his dissent, Justice MARKMAN questions our reliance on *McIntire* by suggesting that *McIntire* has since been rendered moot. We find no support for that suggestion. To the contrary, *McIntire* guides our decision by interpreting a similar statute. The *McIntire* Court recognized—as we do here—that a court is not free to rewrite a statute because the end result may be subjectively unpalatable and that "the object of judicial statutory construction is not to determine whether there are valid *alternative* policy choices that the Legislature may or

the Legislature intended the word "information," as used in MCL 15.391, to include no inherent requirement of veracity, but instead to include statements that may be true or false.[48]

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should have chosen, but to determine from the text of the statute the policy choice the Legislature *actually* made." *McIntire*, 461 Mich at 157 (citation and quotation marks omitted). The *McIntire* Court concluded that the statutory language at issue in that case unambiguously stated the Legislature's actual policy choice and that there was no basis to disregard that choice "to further policy concerns that [a court], but apparently not the Legislature, prefers." *Id*. at 160 (citation and quotation marks omitted). We are still obligated to give weight to the Legislature's decision not to modify "information" in the DLEOA with "truthful" or to impose any other veracity-based limitation on the scope of the statute's protections.

This Court's decision in *McIntire* coupled with the unique history of immunity statutes in Michigan leads us to the conclusion that the DLEOA protects both true and false statements. The dissent would have us abandon *McIntire* in favor of the federal rule articulated in *Glickstein v United States*, 222 US 139, 142; 32 S Ct 71; 56 L Ed 128 (1911). Whatever the merits of that rule, the existence of *McIntire* at the time the DLEOA was enacted provides us great insight into the intent of the Legislature. Accordingly, we see no reason to abandon *McIntire* now. *See Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). We nonetheless recognize that *McIntire* guides us in the limited and unique area of immunity-related statutes, and we express no opinion whether other statutes that incorporate the word "information" in an entirely different context outside that of immunity and compulsory statements might be interpreted differently.

[48] In urging against this result, the prosecution contends that the DLEOA's legislative history makes clear that MCL 15.393 was meant to codify nothing more than the Fifth Amendment protections recognized by *Garrity* and its federal progeny—a contention Justice MARKMAN also notes. We find this line of argument unavailing for several reasons. First, for the reasons already discussed, the plain language of MCL 15.393 controls our analysis and belies this interpretation, making clear that the statute's protections extend beyond those presently guaranteed by the Fifth Amendment. We see no need or place for legislative history in this analysis. Second, the materials offered by the prosecution are legislative analyses, which this Court has recognized to be of little use in discerning the intent of the Legislature. See *Johnson v Recca*, 492 Mich 169, 188; 821 NW2d 520 (2012) (stating that a house legislative

analysis, which is a staff-prepared summary of the law, is entitled to little judicial consideration in the construction of statutes); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001) ("[A] legislative analysis is a feeble indicator of legislative intent . . . ."); *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) ("In no way can a 'legislative analysis' be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process, the members of the House and Senate and the Governor. For that reason, legislative analyses should be accorded very little significance by courts when construing a statute."). And third, these analyses offer no direct insight into the precise scope of the intended codification of *Garrity*, or whether MCL 15.393 was meant to afford protection beyond it. Indeed, it is not even clear whether the drafters of the analyses believed the statute was meant to codify *Garrity* as its rule had been interpreted by the Michigan Court of Appeals in *Allen*—which would render defendants' statements constitutionally protected—or instead to codify *Garrity* as its rule had been developed by subsequent federal caselaw—which would afford no constitutional protection to those statements. Simply put, we see nothing of interpretive use in these materials or of persuasive value in the prosecution's arguments based on them.

Although the parties did not address the question, Justice MARKMAN also offers another interpretive avenue for constraining the scope of the DLEOA's protections to those constitutionally provided under *Garrity* and its federal progeny: he suggests that "truthful" need not be included with "information" in the DLEOA because, as federal Fifth Amendment jurisprudence has held, an individual cannot be compelled to lie; accordingly, even if a lie can be deemed "information," lies cannot be considered an "involuntary statement" or "compelled" within the meaning of the DLEOA. While we recognize the intuitive appeal of this reasoning, we find ourselves unable to square it with *McIntire* and the numerous instances, previously cited in this opinion, in which the Legislature has described "information" as *both* "truthful" and "compelled." See MCL 780.702(3) (referring to "[t]ruthful testimony or other truthful information compelled under the order granting immunity"); MCL 750.157 (referring to "[t]ruthful testimony, evidence, or other truthful information compelled under this section"). If nothing else, these instances make clear that, by the time the DLEOA was enacted, the Legislature was not assuming that the term "compelled" would be inherently limited to its Fifth Amendment meaning or would express an intent to reach only truthful statements. Nor do we discern such a limitation in the term itself or view false statements as necessarily

B. THE PLAIN LANGUAGE OF THE DLEOA REQUIRES DISMISSAL OF THE OBSRUCTION-OF-JUSTICE CHARGES

Applying this interpretation of the DLEOA's plain language, the obstruction-of-justice charges brought against defendants must be dismissed. Defendants provided statements regarding their encounter with Mr. Hodges-Lamar under threat of termination; these statements, though false, are protected by the DLEOA and, therefore, cannot be used against defendants in a criminal proceeding. There is no dispute that defendants' statements provided the only basis for charging them with obstruction of justice and that if this evidence is inadmissible, the charges must be dismissed. According to the Court of Appeals majority, however, this outcome must be rejected because it is "wholly contrary to the Legislature's purpose in enacting the [DLEOA]," which "was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts."[49] Justice MARKMAN now echoes this sentiment in dissent, concluding that "[n]o Legislature, and no legislator, could conceivably have intended such a result."[50]

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voluntary. Indeed, in *Allen*, the Court of Appeals rejected the contention that a false statement cannot be voluntary by observing that "what one reveals as a result of a waiver is of no import in determining whether the waiver was voluntary or coerced." *Allen*, 15 Mich App at 393. In this case, there is no question that, but for the threat of termination, defendants in this case would have remained silent. Again, the advice of rights form presented to defendants by the Detroit Police Department stated, "If I refuse . . . to answer questions . . . , I will be subject to departmental charges which could result in my dismissal from the police department," and "[i]f I do answer . . . , neither my statements or any information or evidence which is gained by reason of such statements can be used against my [sic] in any subsequent criminal proceeding."

[49] *Hughes*, 306 Mich App at 130.

[50] *Post* at 385. In so stating, Justice MARKMAN implicitly suggests that our interpretation of the DLEOA renders an absurd result. A similar argument was raised in *McIntire* and was rejected by this Court.

We understand how this result may be viewed as unpalatable. But as this Court has long made clear, our statutory analysis is controlled by principles of interpretation, not palatability of outcomes. It is not our role to rewrite the law or substitute our own policy judgment in the face of the text of the statute, or "to create an ambiguity where none exists in order to reach a desired result, albeit one with which [we] might wholeheartedly agree [if we were legislators] authorized to enact policy."[51]

For the reasons discussed in this opinion, we discern from the plain language of the DLEOA a legislative intent to protect all *Garrity* statements, regardless of their veracity. And while there may be ample room to question the wisdom of such unqualified statutory protections, we see no principled basis for this Court to ignore or reject the Legislature's enactment of them.

We do not view recognition of these unqualified protections as absurd or flatly at odds with the purpose of the DLEOA. There is seemingly no dispute that the protections offered by the DLEOA are intended to encourage and facilitate officers' participation in internal investigations, with the goal of rendering those investigations more fruitful and effective. As the plain language of the DLEOA makes clear, the Legislature deemed this purpose best served by not limiting the statute's protections only to statements that are true. Regardless of whether we agree with this policy determination, we can conceive of reasons for it. The Legislature may very well have viewed the benefit of such a limitation—namely, the ability to criminally prosecute officers for lies told during an internal investigation—as outweighed by

[51] *McIntire*, 461 Mich at 153 (citation and quotation marks omitted; alterations in original).

its costs. Not all statements, after all, are clearly true or entirely false, and the Legislature may have concluded that qualifying the DLEOA's statutory protections based on veracity would unduly complicate the implementation of those protections[52] or undermine the certainty and effectiveness of the protections offered. Indeed, the *Allen* Court observed that the exception to protection for perjured statements is "more precisely stated" as an exception to protection "where the prosecuting authority *charges* perjury,"[53] a broader scope encompassing prosecutorial discretion and requiring the *jury* to ultimately decide the falsity of a statement. The Legislature may have reasoned—for better or worse—that it was more beneficial to punish the lies uncovered during the course of internal investigations with internal discipline.[54] We fail to see the absurdity in such reasoning, particularly given that the Legislature knows how to, and does, modify the term "information" with "truthful" when it intends to bring only truthful information within the scope of its legislation. And, as this Court stressed in *McIntire*,[55] we need not be sure of the precise reasons for a statutory judgment or be convinced of the wisdom of the legislation.

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[52] As noted earlier, the DLEOA not only prohibits the use of involuntary statements in criminal proceedings, but also restricts their public disclosure. Complications could arise from a nondisclosure rule that turns on a determination of truth; who, for instance, would decide whether an officer's statement was truthful? The DLEOA provides no insight into how such a rule might be implemented.

[53] *Allen*, 15 Mich App at 393.

[54] We also note that the DLEOA does not purport to wholly foreclose criminal prosecution for an officer's conduct that has been the subject of internal inquiry; it simply prohibits using in that prosecution the officer's "involuntary statement" and "any information derived" therefrom. MCL 15.393.

[55] *McIntire*, 461 Mich at 159.

> [I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the ballot box, initiative, referendum, or constitutional amendment.[56]

This statement applies with equal force in the present case. The plain language of the DLEOA protects all statements given by officers under compulsion. This choice may seem odd, or reflective of questionable or even bad public policy, but it was the Legislature's choice to make. We are not empowered to displace what the law actually provides with a judicial preference for what we believe it should provide.

IV. CONCLUSION

In sum, the Legislature chose not to protect only truthful information when it enacted the DLEOA. This is demonstrated by the plain language of the statute when contrasted with the Legislature's known capacity to expressly limit the word "information" based on veracity in other statutes when such a limitation is critical to the Legislature's intent. Accordingly, we must conclude that the DLEOA prohibits the use of an officer's *Garrity* statement, even if false, in a criminal proceeding, including one for perjury or obstruction of justice. The Court of Appeals erred by concluding otherwise. We reverse the judgment of the Court of Appeals to the extent it held that, under the DLEOA, a law enforcement officer's involuntary statement could be used against him or her in a criminal proceeding if the statement was false. We reinstate the orders en-

[56] *Id*. (quotation marks and citations omitted).

tered in the district court that dismissed the obstruction-of-justice charges brought against defendants.

YOUNG, C.J., and MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with ZAHRA, J.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree with the majority opinion to the extent that it holds that the Fifth Amendment does not preclude the use of false statements by a law enforcement officer in a prosecution for obstruction of justice. However, I respectfully disagree with it to the extent that it holds that the disclosures by law enforcement officers act (DLEOA), MCL 15.391 *et seq*., precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice. That is, contrary to the majority, I agree with the Court of Appeals that false statements do not constitute "information" and therefore are not protected by the DLEOA, which only protects "information." Accordingly, I would affirm the judgment of the Court of Appeals.

I. FACTS AND HISTORY

The defendant police officers, Sean Harris, William Little, and Nevin Hughes, were charged with obstruction of justice for lying during an internal investigation of Hughes, who had assaulted Dajuan Hodges-Lamar. The assault was video recorded by a security camera at a gas station.[1] Defendants argued that the Fifth Amendment and the DLEOA prohibit the prosecutor

[1] Defendants Harris and Little did nothing to aid the victim or to prevent the assault. Defendant Hughes was also charged with misconduct in office and assault and battery arising out of the assault on Hodges-Lamar, but those charges are not the subject of this appeal.

from using the statements they made during the investigation. Before defendants provided their statements, the investigating officer provided each with a standard departmental notification-of-constitutional-rights form. This form stated, in relevant part, "If I refuse . . . to answer questions . . . , I will be subject to departmental charges which could result in my dismissal from the police department," and "[i]f I do answer . . . , neither my statements or any information or evidence which is gained by reason of such statements can be used against my [sic] in any subsequent criminal proceeding."[2] Each defendant signed the form and then proceeded to lie, stating that defendant Hughes did not have any physical contact with Hodges-Lamar apart from a pat-down search. The video recording showed otherwise.

The district court dismissed the obstruction-of-justice charges on the basis that defendants' statements to the investigating officer could not be used against them under the DLEOA and the Fifth Amendment,[3] and the circuit court affirmed. In a published and split decision, the Court of Appeals reversed and reinstated the obstruction-of-justice charges against

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[2] Defendants also signed a reservation-of-rights form, which was similar to the notification-of-constitutional-rights form. Defendants now argue that the waivers they signed bar the use of their statements. However, defendants never made this argument in the lower courts, and this argument, therefore, was not addressed. Because defendants did not preserve this argument below, I would hold that it has been waived. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("[A] failure to timely raise an issue waives review of that issue on appeal.") (citation and quotation marks omitted).

[3] The district court was bound by *People v Allen*, 15 Mich App 387; 166 NW2d 664 (1968), which held that the Fifth Amendment protects false statements. The Court of Appeals subsequently observed in the instant case that "[g]iven the intervening developments in federal law, . . . the reasoning of *Allen* cannot stand." *People v Hughes*, 306 Mich App 116, 127; 855 NW2d 209 (2014). For the reasons discussed later, I agree.

all three defendants, holding that neither the Fifth Amendment nor the DLEOA prohibits the prosecutor from using the statements made by defendants during the investigation. *People v Hughes*, 306 Mich App 116; 855 NW2d 209 (2014). Judge WILDER concurred in part and dissented in part. He agreed with the majority that the Fifth Amendment does not prohibit the prosecutor from using defendants' statements, but concluded that the DLEOA does prohibit the prosecutor from using defendants' statements. This Court then granted defendants' applications for leave to appeal. *People v Harris*, 497 Mich 958 (2015).

II. ANALYSIS

A. THE FIFTH AMENDMENT

The Fifth Amendment provides that no person "shall be *compelled* in any criminal case to be a witness against himself . . . ." US Const, Am V (emphasis added); see also Const 1963, art 1, § 17.[4] In *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), several police officers were investigated by the New Jersey Attorney General for fixing traffic tickets.

[4] The parties here do not argue that the Michigan Constitution should be interpreted differently than the United States Constitution. Accordingly, I limit my constitutional analysis to the Fifth Amendment. See *People v Wyngaard*, 462 Mich 659, 671 n 10; 614 NW2d 143 (2000) ("We confine our analysis to the Fifth Amendment because defendant has not argued that art 1, § 17 provides broader protections."); see also *People v Tanner*, 496 Mich 199, 256; 853 NW2d 653 (2014) ("Although this Court need not interpret a provision of our Constitution in the same manner as a similar or identical federal constitutional provision, we are persuaded in the present instance, on the basis of our examination of Article 1, § 17, that the United States Supreme Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment in [*Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986)] constitutes the proper interpretation of Article I, § 17 as well.").

After having been warned that if they refused to answer questions they would be subject to removal from office, the officers answered the questions asked of them during the investigation. *Id*. at 494-495. The Court held that their answers were "compelled" within the meaning of the Fifth Amendment and therefore that the statements could not be used against them in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. *Id*. at 497-500. The Court explained that "protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id*. at 500.[5]

However, in *United States v Wong*, 431 US 174, 179; 97 S Ct 1823; 52 L Ed 2d 231 (1977), the United States Supreme Court held that "the Fifth Amendment privilege does not protect perjury . . . ." Instead, "[i]t grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testifies with a license to commit perjury.' " *Id*. at 178 (citation omitted). Therefore, the Court held that the defendant's false testimony was admissible in a subsequent perjury trial even though the defendant had provided the false testimony without being informed of her Fifth Amendment right to remain silent.[6] "[E]ven the pre-

[5] However, "given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." *Lefkowitz v Turley*, 414 US 70, 84; 94 S Ct 316; 38 L Ed 2d 274 (1973). Such statements are now sometimes referred to as "*Garrity* statements."

[6] More specifically, the Court held that "a witness who, while under investigation for possible criminal activity, is called to testify before a grand jury and who is later indicted for perjury committed before the

dicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury." *Id*. at 178. "[B]y answering falsely the [defendant] took 'a course that the Fifth Amendment gave [defendant] no privilege to take.' " *Id*. at 178-179 (citation omitted). "Indeed, even if the Government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely." *Id*. at 180. "If the citizen answers the question, the answer must be truthful." *Id*.

Similarly, in *United States v Apfelbaum*, 445 US 115, 117, 131; 100 S Ct 948; 63 L Ed 2d 250 (1980), the United States Supreme Court held that the "proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely," and thus "neither the [federal use-immunity] statute[7] nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements . . . ." That is, "perjury prosecutions are permissible for false answers to questions following the grant of immunity" because "the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury . . . ." *Id*. at 126-127. See also *McKinley v City of Mansfield*, 404 F3d 418, 427 (CA 6, 2005) ("As a matter of Fifth Amendment right, *Garrity* precludes

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grand jury, is [not] entitled to have the false testimony suppressed on the ground that no effective warning of the Fifth Amendment privilege to remain silent was given." *Wong*, 431 US at 174-175, 178.

[7] The federal use-immunity statute, 18 USC 6002, provides that when a witness is compelled to testify over his or her claim of a Fifth Amendment privilege, "no testimony . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. However, *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it.") (citation omitted); *id*. ("[T]he Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes such as perjury or obstruction of justice.").

In light of this caselaw, it is clear that the Fifth Amendment does not protect a defendant from a subsequent prosecution for perjury or obstruction of justice predicated on false statements that the defendant made after having been granted immunity from prosecution.[8] Therefore, defendants' false statements are not inadmissible under the Fifth Amendment. As a result, I agree with the Court of Appeals that

> [t]he Fifth Amendment did not bar the admission of defendants' false statements in the instant prosecutions for obstruction of justice. The district court abused its discretion by relying on the Fifth Amendment to exclude defendants' false statements from evidence. [*Hughes*, 306 Mich App at 128.]

B. DLEOA

The Court of Appeals also held that the DLEOA does not bar admission of defendant's false statements, and again I agree. MCL 15.393 of the DLEOA provides:

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[8] Indeed, defense counsel for defendant Little seemed to concede this at oral arguments before this Court. Chief Justice YOUNG asked defense counsel, "The protection afforded by *Garrity* did not extend to lies made as a *Garrity* statement, correct?" Defense counsel responded, "Absolutely correct[.]"

> An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.[9]

1. "INFORMATION"

MCL 15.391 defines the term "involuntary statement" as "*information* provided by a law enforcement officer, if *compelled* under threat of dismissal from employment or any other employment sanction . . . ." (Emphasis added.) "Information" is defined as "**1.** knowledge communicated or received concerning a particular fact or circumstance; news. **2.** Knowledge gained through study, communication, research, instruction, etc.; data; facts." *Random House Webster's College Dictionary* (1992).[10] In turn, "knowledge" is

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[9] In addition, MCL 15.395 provides, in pertinent part:

> An involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. The statement may be disclosed by the law enforcement agency only under 1 or more of the following circumstances:
>
> (a) With the written consent of the law enforcement officer who made the statement.
>
> (b) To a prosecuting attorney or the attorney general pursuant to a search warrant, subpoena, or court order, including an investigative subpoena issued under chapter VIIA of the code of criminal procedure, 1927 PA 175, MCL 767a.1 to 767a.9. However, a prosecuting attorney or attorney general who obtains an involuntary statement under this subdivision shall not disclose the contents of the statement except to a law enforcement agency working with the prosecuting attorney or attorney general or as ordered by the court having jurisdiction over the criminal matter or, as constitutionally required, to the defendant in a criminal case.

[10] Similarly, "inform" means "to give or impart knowledge of a fact or circumstance to" or "to supply (oneself) with knowledge of a matter or subject[.]" *Random House Webster's College Dictionary* (1992). Lies do not "impart knowledge." Indeed, one becomes increasingly *less* informed

defined as "acquaintance with facts, *truths*, or principles[.]" *Id*. (emphasis added).[11] As the Court of Appeals explained:

> The phrase "involuntary statement" is defined as "*information* provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." MCL 15.391(a) (emphasis added). But when an officer is compelled to make a statement during an internal investigation, and provides only misinformation and lies, he or she has not provided any "information" at all within the commonly understood meaning of that word. Among other things, "information" is defined as "knowledge communicated or received concerning a particular fact or circumstance." *Random House Webster's College Dictionary* (1997). The word "knowledge," in turn, is defined as "the body of truths or facts accumulated in the course of time." *Id*. Because an officer's lies do not impart any truths or facts, they necessarily do not constitute "information." See MCL 15.391(a).[12] In other words, an officer's lies and

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as the result of lies. Consider, for example, the concept of "informed consent," which is defined as "a patient's consent to a medical or surgical procedure or to participation in a clinical study after being *properly* advised of the relevant medical facts and the risks involved." *Id.* (emphasis added). We would never state that a patient who consented to a medical procedure after being lied to about the relevant medical factors or risks in that medical procedure provided genuinely "*informed* consent." Likewise, we should not here conclude that officers who lied about misconduct nevertheless provided "information."

[11] Similarly, "knowledgeable" means "well-informed." *Random House Webster's College Dictionary* (1992). We do not think of someone who knows nothing accurate about a subject as being "knowledgeable" or "well informed" regarding that subject. Accordingly, we should not think of someone who provided inaccurate statements as having imparted "knowledge" or "information" in that regard.

[12] The majority concludes that the definitions of "information" and "knowledge" do not exclude statements that are false. However, all the definitions that the majority relies on *do*, in my opinion, exclude statements that are deliberately false, such as the ones at issue here.

> false statements do not qualify as "involuntary statement[s]" under MCL 15.393, and consequently may be used as evidence in a subsequent criminal prosecution. [*Hughes*, 306 Mich App at 129-130.]

Judge WILDER concurred with the Court of Appeals majority regarding the Fifth Amendment issue, but dissented on the statutory issue on the basis that lies constitute "information." As already explained, I agree with the Court of Appeals majority that lies do not constitute "information" as that term is commonly understood.[13] In other words, I do not believe most people would reasonably conclude that a person has provided them with "information" if all that the other person has done is tell them lies.[14]

The majority relies on the following definitions of "information": "knowledge communicated or received concerning a particular fact or circumstance"; "[k]nowledge or facts communicated about a particular subject, event, etc.; intelligence, news"; and "the communication or reception of knowledge or intelligence[.]" (Citations and quotation marks omitted). In addition, the majority relies on the following definition of "knowledge": "the sum of what is known[.]" (Citation and quotation marks omitted). Each of these definitions strongly suggest that "information" and "knowledge" are things that are known, or at least believed, to be true at the time that they are communicated. However, when the officers *here* provided the statements at issue, they *knew* that their statements were *false*. That is, the officers "knew" that defendant Hughes assaulted Hodges-Lamar, and yet they stated just the opposite. Thus, the officers' statements were very much at odds with their "information" or "knowledge" on the subject of what had occurred concerning Hodges-Lamar.

[13] Even putting aside the dictionary definitions this opinion cites, I do not believe that *any* ordinary or reasonable meaning of the word "information" includes false statements, and the majority identifies none. Would one person of a hundred taken at random from the streets of any community of this state disagree regarding this entirely ordinary meaning? And would it make the slightest difference whether any of them relied on a collegiate dictionary, a children's dictionary, a supermarket dictionary, an English-as-a-second-language dictionary, the Oxford English Dictionary, or no dictionary at all?

[14] The majority relies on the Corpus of Contemporary American English (COCA), a truly remarkable and comprehensive source of

ordinary English language usage compiled by linguistic scholars at Brigham Young University, in particular Professor Mark Davies. The COCA, available at <http://corpus.byu.edu/coca/> (accessed June 7, 2016), is an online "resource [that can be used by courts] for assessing the ordinary meaning of a statutory term." *State v Rasabout*, 2015 Utah 72, ¶ 72; 356 P3d 1258 (2015) (Lee, A.C.J., concurring in part) (assessing with an impressive thoroughness, in ¶¶ 40-134, the strengths and limitations of using a corpus to facilitate the interpretive processes of the judiciary). By using the COCA, "we can access large bodies of real-world language to see how particular words or phrases are actually used in written or spoken English." *Id.* at ¶ 57. However, notwithstanding the majority's invocation of the COCA, I believe that the COCA actually supports the proposition set forth in this dissent that the common and most reasonable understanding of the term "information" excludes false statements. The term "information" is found within the COCA 168,187 times, and yet it is only modified by the term "truthful" 28 times, "true" 18 times, "accurate" 508 times, "inaccurate" 112 times, and "false" 271 times. In other words, the term "information" is modified by one of these adjectives 937 times. The other 167,250 times that the word "information" is used it is unmodified by one of these adjectives. That is, 99.44% of the time "information" in the COCA is unmodified by any of these adjectives related to veracity. Therefore, I disagree with the majority's contention that the COCA affords support for the proposition that the term "information" is "regularly" or "commonly" modified by one of these adjectives. I find to the contrary. And where "information" is *unmodified* by one of these adjectives, I believe it is overwhelmingly used to refer to truthful information. See, e.g., the utterly ordinary, commonplace, and pedestrian usages of "information" set forth in the COCA (among 167,248 others) at Morgenson, *Outside Advice on Boss's Pay May Not Be So Independent*, New York Times (April 10, 2006) ("The company operates Verizon's employee benefits Web sites, where its workers get information about their pay, health and retirement benefits, college savings plans and the like."); Anderson, *As Lenders, Hedge Funds Draw Insider Scrutiny*, New York Times (October 16, 2006) ("When a public company takes out a loan, it generally agrees to provide the lender with certain information, sometimes including monthly financial updates."). I do not believe that a judicial interpretation of "information" drawn from use of the term in ½ of 1% of all of its appearances in a corpus constitutes an ordinary, common, or reasonable interpretation of the term. There is no word that cannot be abused, misused, or employed in an exotic or puzzling way in everyday discourse, and a corpus will reflect this reality; it is not, however, the purpose of a corpus to transform every such use of a word into a

Judge WILDER concluded that because "misinform" is defined as "giv[ing] false or misleading information," *Random House Webster's College Dictionary* (1997), "the term 'information' as used in MCL 15.393 must be interpreted to include the giving of 'misinformation.' " *Hughes*, 306 Mich App at 134 (WILDER, J., concurring in part and dissenting in part). I respectfully disagree. "Mis" is a prefix meaning the "opposite," "lack of," or negative of something. *Merriam Webster's Collegiate Dictionary* (11th ed).[15] Therefore, "misinformation" constitutes the "opposite" of "information," and because "misinformation" means "false or misleading information," it follows that "information" means true or accurate information.[16] Contrary to the contentions of Judge WILDER and now the majority in this Court, "misinformation" by its prefix signifies that it is *com-*

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reasonable construction of the words of the law. As Lincoln once remarked, "calling the tail [of a calf] a leg, [does] not make it a leg . . . ." 2 Burlingame, *Abraham Lincoln: A Life* (Baltimore: Johns Hopkins University Press, 2008), p 468 (citation and quotation marks omitted). Furthermore, the reader may wish to peruse at random any number of the 167,250 uses of "information" in the COCA and assess whether the term was reasonably used and understood as indistinguishably referring to true and false information. When, for example, the doctor is offered "information" from a patient concerning the latter's condition, would either party suppose that the latter was not intending in a reasonably accurate manner to describe his symptoms as he then believed them to be? Or, by further example, when a "contract" or "trade-off" of some kind is delineated by the elected representatives of the people in the Legislature, with an explicit quid pro quo defined in terms of the production of "information," and presumably with *some* measure of public benefit to be derived by the production of that "information," could that Legislature genuinely have been disinterested in whether such information was true or false?

[15] See also *Random House Webster's College Dictionary* (1992), which defines "mis" as "a prefix applied to various parts of speech, meaning 'ill,' 'mistaken,' 'wrong,' 'wrongly,' 'incorrectly,' or simply negating: mistrial; misprint; mistrust."

[16] Similarly, "disinformation" means "false information deliberately and often covertly spread (as by the planting of rumors) in order to

paring itself to "information;" it is not referring to a *subset*, a *type*, or a *class*, of "information."

Judge WILDER and the majority in this Court also rely on the fact that a number of Michigan statutes refer to "inaccurate" or "misleading" information. See, e.g, MCL 769.34(10); MCL 750.492a(1); MCL 168.467b(6); MCL 487.2140(2); MCL 791.235(1)(b). However, I believe that this actually supports the Court of Appeals majority's conclusion that "information" signifies truthful information because in those unusual circumstances in which the Legislature is intending to refer to untruthful information, it expressly refers to "inaccurate" or "misleading" information. That is, the Legislature recognizes that when it intends to refer to untruthful information, it needs to supply a modifier to precede "information" because, when unmodified, "information" signifies truthful information.[17] The Legislature's affirmative and specific references to "inaccurate" or "misleading" information in the previously cited provisions in contrast to the *absence* of such modifying terms in MCL 15.391 evidences its intention to limit the DLEOA's protection to "information," and what is ordinarily connoted by this

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influence public opinion or obscure the truth," and the prefix "dis" means "[to] do the opposite of[.]" *Merriam Webster's Collegiate Dictionary* (11th ed).

[17] Judge WILDER also relied on the fact that MCL 15.393 refers to "*a* criminal proceeding," rather than *the* criminal proceeding. See MCL 15.393 ("An involuntary statement made by a law enforcement officer . . . shall not be used against the law enforcement officer in *a* criminal proceeding.") (emphasis added). However, it would not make any sense for MCL 15.393 to refer to *the* criminal proceeding because at the time that a *Garrity* statement is given, there is no criminal proceeding to definitively identify by use of the definite article "the." Furthermore, the fact that the statute refers to "*a* criminal proceeding" rather than "*the* criminal proceeding" simply does not address the question at issue here—whether an officer's *false* statements can be used against the officer "in a criminal proceeding."

term, and not to extend it to inaccurate or misleading information. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *Paselli v Utley*, 286 Mich 638, 643; 282 NW2d 849 (1938) ("This court cannot write into the statutes [protections] that the legislature has not seen fit to enact.").

The majority in this Court concludes that because the Legislature has modified the term "information" with the adjective "truthful" in other statutes, but not the instant one, it must have intended the term "information" in the instant statute to include both truthful and false information. That is, the Legislature obviously knew how to limit "information" to only "truthful information," and it chose not to limit "information" in that manner in the instant statute. Again, I respectfully disagree. The majority cites nine statutes that contain the phrase "truthful information."[18] However,

[18] These statutes will be discussed in greater detail in the main text of this opinion, but for context, I note that six of the statutes the majority relies on are either in the Michigan Penal Code or the Code of Criminal Procedure, and one is in the Fire Prevention Code. These seven statutes provide that compelled, truthful information "shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury," with the exception of MCL 750.122(2), which is an exception to the bribery statute that allows a witness to be paid "reasonable costs" to "provide truthful information." The eighth and ninth statutes relied on by the majority are quite different from the preceding seven statutes. The eighth statute, MCL 400.111b, is part of the Social Welfare Act, and it provides, in pertinent part, that a healthcare "provider shall certify that a claim for payment . . . does not contain untrue, misleading, or deceptive information" and that the "provider shall supply complete and truthful information as to his or her professional qualifications and training . . . ." MCL 400.111b(17) and (20). The ninth statute, MCL 333.17014, is part of the Public Health

six of those statutes were amended in the immediate aftermath of this Court's decision in *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), which held that a witness did not have to answer questions truthfully in order to receive immunity under MCL 767.6. See MCL 29.7(4); MCL 750.157; MCL 750.453; MCL 750.125(5); MCL 780.702(3); MCL 780.702a(6). That is, in the immediate aftermath of *McIntire*, the Legislature inserted "truthful" into MCL 767.6 and other related statutes.[19] As this Court has recognized, this kind of legislative history constitutes the "highest quality" of legislative history. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). One of the other statutes that the majority relies on, MCL 750.122, was also enacted in the wake of *McIntire*.[20] Thus, seven out of the nine statutes the majority relies on were amended or enacted immediately after *McIntire* was decided. This is significant because it strongly suggests that before *McIntire* was decided, the Legislature understood that the term "information" by itself means "truthful information," and it was not until after *McIntire* was decided that the Legislature felt it was necessary to modify "information" with "truthful" in order to limit the protections of these statutes to only "truthful information."[21]

Code and sets forth legislative findings, rather than substantive law. It explains that the related substantive laws were designed to provide "objective, truthful information" so that women can make informed decisions about abortions.

[19] *McIntire* was decided on September 14, 1999, and these statutes were amended on December 28, 1999.

[20] MCL 750.122 was enacted on January 9, 2001, and became effective on March 28, 2001.

[21] The majority also suggests that because numerous statutes expressly state that compelled information "shall not be used against the witness in a criminal case, except for impeachment purposes or in a

The other two statutes that the majority relies on were enacted before *McIntire* was decided, but are quite distinguishable. To begin with, MCL 400.111b, a statute within the Social Welfare Act, refers to both "untrue, misleading, or deceptive information" and "truthful information." Given that the statute initially uses the phrase "untrue information," it makes sense that when the statute subsequently uses the term "information," the Legislature would choose to clarify that it was referring to "truthful information" on this occasion, rather than the previously mentioned "untrue information."

The final statute the majority relies on, MCL 333.17014, a statute within the Public Health Code, sets forth the legislative findings that supported the Legislature's enactment of MCL 333.17015 and MCL 333.17515. Legislative findings do not constitute substantive law. See *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 79 n 20; 748 NW2d 524 (2008). Although the legislative-findings statute, MCL 333.17014, on one occasion refers to "truthful information," neither of the substantive statutes, MCL 333.17015; MCL 333.17515, refers to "truthful information," even though one of the substantive statutes, MCL 333.17015, repeatedly refers to "information," and, given the context, it is clear that the statute is referring to "truthful information." Furthermore, although the legislative-findings statute itself repeatedly uses

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prosecution for perjury," see, e.g., MCL 750.453, and the instant statute does not, we should not incorporate such an exception into the instant statute. However, there are only eight statutes that contain this language, and none of them contained that language until they were amended in 1999 immediately after *McIntire* was decided. See MCL 29.7(4); MCL 750.125(5); MCL 750.157; MCL 750.453; MCL 767.6(3); MCL 767.19b(2); MCL 780.702(3); MCL 780.702a(6). In addition, see the discussion of *Glickstein v United States*, 222 US 139; 32 S Ct 71; 56 L Ed 128 (1911), later in this opinion.

the word "information" in a manner that makes it clear the Legislature is referring to "truthful information," the Legislature only modified the term "information" with "truthful" on a single occasion in that statute.

The majority thus has identified nine statutes that use the phrase "truthful information," and from this the majority concludes that "information" unmodified by "truthful" must include both truthful and false information. However, the majority does not take into account that the Legislature has used the word "information" in 4,849 statutes, and only nine of these statutes modify "information" with "truthful." Does the majority truly believe that in the other 4,840 statutes in which the Legislature used "information" it was referring to both true and false information?[22] I simply cannot believe it possible that in the nearly 5,000 laws enacted by our Legislature in which "information" was required to be provided, considered, acted on, shared, or evaluated, those laws were unconcerned with, or disinterested in, whether such information was true or false.

Although the Legislature added "truthful" before "information" in a handful of statutes following *McIntire*, the Legislature likely did not believe it needed to add "truthful" before "information" when it enacted the DLEOA in 2006 (seven years after *McIntire* was decided) because: (a) the DLEOA was viewed as a codification of *Garrity* and its progeny, and it is clear that false statements are not protected under those decisions; and (b) the Legislature almost certainly perceived the word "information" as only connoting truth-

[22] I recognize that in a few of these statutes the word "information" is modified by other adjectives, such as "inaccurate" or "misleading"; as previously discussed, however, I believe that in the great majority of these statutes "information" is used to mean "truthful information."

ful information and simply did not feel obligated in perpetuity to add "truthful" every time it used the word "information" just as it might not feel obligated in perpetuity to say "dogs but not cats" in place of "dogs" if, for example, this Court had issued an opinion stating that "dogs" means both "dogs and cats."[23]

The majority's reliance on *McIntire* for anything other than explaining why the Legislature amended MCL 767.6 and similar statutes to add the word "truthful" is misplaced. As the majority explains, *McIntire* involved the interpretation of MCL 767.6, which at the time provided that "[n]o person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him." MCL 767.7, as amended by

[23] At some juncture after this Court has interpreted words in a highly unusual manner, the Legislature must be allowed again to use words as they are commonly understood by the people whom they represent. That is, it is one thing to say that when, in the ordinary course of statutory interpretation, this Court has interpreted a word, the next time the Legislature uses that same word, it is presumed to mean what we have previously said it means, but it is quite another thing to say that when this Court has interpreted a word in a highly unusual manner, we will presume that whenever that same word is subsequently used by the Legislature, it is presumed to mean what we have previously said it means. After some reasonable duration, we have to assume that when the Legislature uses the word "dogs," it means "dogs," and not forevermore "dogs and cats." And perhaps most importantly, in the final analysis, it is this Court that must adhere to the language of the people and their representatives and not the people and their representatives that must adhere to the language of this Court. It was this Court's decision in *McIntire* in 1999 that has now led to the extraordinarily odd circumstance 17 years later—that in order to effectively communicate its intentions, the Legislature apparently must, whenever it seeks to legislate concerning "information," systematically insert in the law a disclaimer: "provided, however, that the information requested or provided in this statute be truthful." This Court may understand the point of such language, but others who are governed by this law will only be confused and befuddled.

1951 PA 276. Although the majority claims that the statute at issue in *McIntire* and the statute at issue here are "similar," and perhaps in some ways they are, there is a critical and relevant difference—only the latter pertains to "information." It is one thing to say that a person can answer questions falsely; it is another thing to say that a person provides "information" when he or she provides false statements. *McIntire* reached the former holding, but not the latter. That is, nothing within *McIntire* can be read to suggest that false statements constitute "information." The only thing that *McIntire* held was that under MCL 767.6, as it was drafted at the time, a witness who answered questions under an order granting immunity was entitled to such immunity, regardless of whether the witness answered the questions truthfully or falsely.

I agree with the majority that *McIntire*'s actual holding has not been overruled by this Court and presumably never will be because, as already discussed, the statute at issue has since been amended in such a way that the issue addressed in *McIntire* will not arise again. The majority seems to believe that this means that we are forevermore encumbered with *McIntire*'s holding that a person's statements do not have to be truthful in order for that person to be entitled to immunity. Apparently, the majority believes that to be the case even though *McIntire* has been superseded by statute and the Legislature has employed statutory language that is entirely different from the language that was at issue in *McIntire*. Importantly, the statute at issue in *McIntire* did not use the word "information," and *McIntire* thus did not address its meaning, but the majority uses *McIntire* to support its conclusion that "information" refers to both true and false statements. However, because the

statute at issue here, unlike that at issue in *McIntire*, only protects "information," *McIntire* does not require us to hold that false statements are protected by the statute at issue here. And simply because the Legislature directly reacted to *McIntire* by inserting the word "truthful" before the word "information" in a handful of statutes does not mean that we must forevermore hold that whenever the Legislature does not add the word "truthful" before "information," it must be referring to both truthful and false statements. Rather, what most obviously can be drawn from the Legislature's response to *McIntire* is that *McIntire*'s equivalent treatment of truthful and false statements was squarely repudiated, an equivalency that is exactly repeated in the majority's interpretation in the instant case.

The majority asserts that "the existence of *McIntire* at the time the DLEOA was enacted provides us great insight into the intent of the Legislature" and "we see no reason to abandon *McIntire* now." However, given that *McIntire* did not interpret the term "information" as we are called upon to do now, and given that *McIntire* has already been emphatically superseded by legislative enactments, see note 19 of this opinion, I am baffled as to what "great insight into the intent of the Legislature" the majority has derived from *McIntire* that I am supposedly urging it to "abandon." If this "great insight" is this Court's obligation to adhere to the plain language of a statute, I am hardly urging the majority to abandon this. Indeed, it is precisely the plain language of the DLEOA that causes me to conclude that the act does not protect false statements. That is, because the DLEOA only protects "information," and because the plain meaning of the term "information" does not encompass

false statements, the DLEOA does not protect false statements.

2. "COMPELLED"

Additionally, MCL 15.391 defines the term "involuntary statement" as "information provided by a law enforcement officer, if *compelled* . . . ." (Emphasis added.) Not only are lies not "information," but they are also not "compelled."[24] That is exactly why the Fifth Amendment prohibition against compelled self-incrimination does not protect perjury. See *Wong*, 431 US at 178 ("It grants a privilege to remain silent without risking contempt, but it does not endow the person who testifies with a license to commit perjury.") (citation and quotation marks omitted); *Lefkowitz v Turley*, 414 US 70, 77; 94 S Ct 316; 38 L Ed 2d 274 (1973) ("The object of the Amendment 'was to insure that a person should not be compelled . . . to give testimony which might tend to show that he himself had committed a crime.' ") (citation omitted). Neither the Fifth Amendment nor the DLEOA was ever intended to protect false statements made to cover up criminal activity.

As previously noted, the Fifth Amendment provides that no person "shall be compelled . . . to be a witness against himself . . . ." US Const, Am V. "The design of the [Fifth Amendment] privilege is . . . to protect [a person] against being compelled to furnish evidence to convict him of a criminal charge." *Brown v Walker*, 161 US 591, 605-606; 16 S Ct 644; 40 L Ed 819 (1896). In other words, "the Fifth Amendment privilege speaks only of compulsion[.]" *People v Wyngaard*, 462 Mich 659,

[24] Defense counsel for defendant Harris admitted this at oral arguments when he stated, "Nobody's compelled to lie . . . ."

672; 614 NW2d 143 (2000). Therefore, the applicability of Fifth Amendment protection often turns on whether a person's testimony or statements were compelled.[25]

Pertinent to the instant case, the United States Supreme Court has long recognized that the Fifth Amendment does not endow a person with a license to commit perjury. See *Glickstein v United States*, 222 US 139, 142; 32 S Ct 71; 56 L Ed 128 (1911) ("[T]he immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with a license to commit perjury."). In *Glickstein*, the Court construed a similar immunity statute that did not contain an exception for perjury.[26] In addressing whether the statute immunized false statements, the Court stated:

> [T]he statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.
>
> The argument that because the section does not contain an expression of the reservation of a right to prosecute for

[25] See, e.g., *Minnesota v Murphy*, 465 US 420, 440; 104 S Ct 1136; 79 L Ed 2d 409 (1984) (holding that because the defendant's disclosures were not compelled incriminations, he could not invoke the Fifth Amendment privilege); *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966) ("[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

[26] The statute provided, in pertinent part, " 'no testimony given by him shall be offered in evidence against him in any criminal proceeding.' " *Glickstein*, 222 US at 140-141 (citation omitted). See also note 21 of this opinion.

> perjury in harmony with the reservations in Rev. Stat., § 860, and the act of 1893, therefore it is to be presumed that it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect.
>
> Bearing in mind the subject dealt with we think the reservation of the right to prosecute for perjury made in the statutes to which we have referred was but the manifestation of abundant caution, and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure. [*Id.* at 143-144.][27]

The Court concluded that the statute, in compelling the giving of testimony, did not confer immunity wider than that guaranteed by the Constitution. *Id.* at 142-144.

I believe *Glickstein* is instructive in assessing the majority's argument that the DLEOA includes false statements because the Legislature did not use the term "truthful information." *Glickstein* rejected the defendant's analogous argument that, because the statute in that case did not include a perjury exemption that had been included in other statutes, such an exemption did not exist. Similarly, the Michigan Legislature's use of "truthful" in other statutes appears at most to only reflect a "manifestation of abundant

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[27] This passage suggests that, absent manifest legislative intent to the contrary, statutes compelling the giving of testimony are presumed to require that the testimony be truthful. If such a presumption had been in play in *McIntire*, perhaps this Court would have reached a different result.

caution" rather than suggesting that the DLEOA does not extend to false statements. *Id*. at 144.

Further, although *Glickstein* did not clearly explain why the Fifth Amendment does not endow a person with a license to commit perjury, it recognized the critical relationship between compelled statements and the truth. The United States Supreme Court expounded on this relationship in *United States v Knox*, 396 US 77; 90 S Ct 363; 24 L Ed 2d 275 (1969), holding that the Fifth Amendment does not protect perjury because those false statements are not compelled. In *Knox*, the defendant was indicted for including false, material information in his tax filings. He sought Fifth Amendment protection, arguing that his tax filings were compelled by statute and that, had he not filed truthful and complete forms as required, he would have incriminated himself. Similarly, filing no forms at all would have also subjected him to prosecution. The Court rejected the defendant's argument, noting that he had "taken a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take." *Id.* at 82. The Court stated that "when [defendant] responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion." *Id.* Similarly, in *Wong*, 431 US at 178, the Court confirmed that the Fifth Amendment does not condone perjury, emphasizing that "the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury."[28]

[28] Other courts have reached the same conclusion. See, e.g., *United States v Thomas*, 612 F3d 1107, 1128 (CA 9, 2010) ("But [defendant] was not in any way compelled to 'knowingly giv[e] Grand Jury testimony that was intentionally evasive, false, and misleading' by virtue of her grand jury subpoena.") (second alteration in original); *United States v*

Garrity statements are protected by the Fifth Amendment because, by requiring an individual to choose between self-incrimination and job forfeiture, the resulting statements are compelled. *Garrity*, 385 US at 497-498. These statements are "infected by the coercion inherent in [the] scheme of questioning and cannot be sustained as voluntary . . . ." *Id*. But, *Garrity* does not provide a license to lie or commit perjury. *United States v Veal*, 153 F3d 1233, 1243 (CA 11, 1998).[29] The Fifth Amendment does not protect false *Garrity* statements because those "deliberate, false statements" result from "independent, voluntary choices." *Id.* at 1244.[30] The statements therefore provide an avenue for the prosecution of obstruction of justice.

The issue here is whether defendants' statements were protected by the DLEOA, not the Fifth Amendment. But in the DLEOA, the Legislature used the term "compelled" when providing statutory protection

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Phillips, 540 F2d 319, 332 (CA 8, 1976) ("[Defendant's] decision to proffer false answers was in no way compelled; it was a voluntary decision on his part."); *Commonwealth v Good*, 461 Pa 546, 553; 337 A2d 288 (1975) (holding witnesses who lied to a grand jury were not compelled to be witnesses against themselves); *United States v Tramunti*, 500 F2d 1334, 1342 (CA 2, 1974) ("If he gives false testimony, it is not compelled at all. . . . [False testimony] is not the incriminatory truth which the Constitution was intended to protect.").

[29] *Veal* was overruled on other grounds by *Fowler v United States*, 563 US 668 (2011).

[30] The fact that *Garrity* statements are not made under oath is immaterial to the Fifth Amendment analysis. *Veal*, 153 F3d at 1241 ("Like false testimony before a grand jury, the Court has not excluded from criminal liability false statements made to government agents or agencies, whether or not those statements were made under oath."). See also *LaChance v Erickson*, 522 US 262, 267; 118 S Ct 753; 139 L Ed 2d 695 (1998) (holding that it was irrelevant that statements were not made under oath for the purpose of criminal culpability for making false statements to government agency investigators).

to *Garrity* statements. As already explained in this opinion, when considering whether the privilege against self-incrimination is implicated, Fifth Amendment jurisprudence focuses extensively on whether the testimony or statements were "compelled." In this context, "compelled" has acquired a particular meaning, requiring courts to consider whether specific circumstances giving rise to compulsion are present such that Fifth Amendment protection applies.[31] Because of this, "compelled" should be construed and understood in accordance with that meaning. MCL 8.3a; *People v Law*, 459 Mich 419, 425 n 8; 591 NW2d 20 (1999). Giving the appropriate meaning to this term of art, the DLEOA does not bar the use of the statements because defendants' decision to lie constituted a voluntary choice that was not "compelled under threat of dismissal from employment or any other employment sanction . . . ." MCL 15.391.

The government here did not "compel" defendants to lie. Rather, it sought only to "compel" defendants to tell the truth. That defendants chose to provide exculpatory falsehoods, rather than inculpatory truths, resulted in their loss of protection under the Fifth Amendment and MCL 15.393. See *Wong*, 431 US at 178 ("[E]ven the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury.").[32] Our

[31] Cf. *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1189; 182 L Ed 2d 17 (2012) ("As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.").

[32] Nothing in the way of rational public policy would result from protecting exculpatory falsehoods. By such a conclusion, the government would be unable to obtain information that it needs to uncover police misconduct, and officers who possess such information would be permitted to lie about it without concern for criminal repercussions.

Constitution and laws protect compelled "information"—incriminating truths, not exculpatory falsehoods.[33]

3. CONTEXT

It must finally be noted that "[a] court does not construe the meaning of statutory terms in a vacuum." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (quotation marks and citation omitted). "Rather, we interpret the words in their context and with a view to their place in the overall statutory scheme." *Id*. (quotation marks and citations omitted). See also *Michigan ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 59; 852 NW2d 103 (2014) ("Individual words and

[33] For what it is worth, interpreting MCL 15.393 as providing the same protections as *Garrity* and its progeny, i.e., as not protecting false statements, is also consistent with House Legislative Analysis, SB 647, December 7, 2006, which states:

> The U.S. Supreme Court has already established that involuntary statements made by law enforcement officers during internal investigations cannot be used against the officers in a criminal prosecution. Concerning this matter, the bill would simply *codify the federal court ruling*. [Emphasis added.]

It is likewise consistent with Senate Legislative Analysis, SB 647, February 20, 2007, which states:

> By providing that an involuntary statement made by a law enforcement officer, and any information derived from it, may not be used against the officer in a criminal proceeding, the bill effectively *codifies Garrity protections in Michigan statutory law*. [Emphasis added.]

Contrary to the majority's suggestion, by the time that the DLEOA was enacted in 2006, the "*Garrity* protections" were well understood as excluding protection of false statements. While I recognize the limitations inherent in reliance on legislative analyses as an aid in the construction of a statute, see *In re Certified Question*, 468 Mich at 115 n 5, it is nonetheless notable when the construction of a statute, reached without reliance on a legislative analysis, conforms fully with such a legislative analysis.

phrases are not read in a vacuum; we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.") (quotation marks and citation omitted). The statute at issue here is based upon an obvious theory of quid pro quo: police officers provide information to the government about police misconduct, and in exchange the government agrees not to use the information against the officers. Both the government and the officers thereby receive a benefit—the government receives information that may be helpful in identifying criminal misconduct, and the officers effectively receive immunity.[34] However, where the officers proceed to lie to the government, the government is deprived of that to which it was entitled in exchange for the grant of immunity—information.[35] There is simply no longer any consideration given by the officers, i.e., there is no quid pro quo. In such a situation, the officers should likewise be deprived of that for which they bargained—immunity. Otherwise, they would receive what they bargained for—immunity—without having to fulfill their part of the bargain—providing information—and the manifest truth-seeking function of the statute would thus be nullified. No Legislature, and no legislator, could conceivably have intended such a result. As the Court of Appeals explained:

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[34] More specifically, the officers' statements cannot be used against them in a criminal proceeding. However, the practical effect of that is almost always going to be the same as immunity, as it was in this case.

[35] Cf. *Apfelbaum*, 445 US at 132 (Brennan, J., concurring in the judgment) (recognizing that the perjury exception to the Fifth Amendment is based in part on "the simple reality that affording the witness a right to lie with impunity would render the entire immunity transaction futile."); *id*. at 135 (Blackmun, J., concurring in the judgment) ("Perjury or the making of false statements under a grant of immunity thus violates a basic assumption upon which the privilege and hence the immunity depend.").

> We conclude that the Legislature's manifest intent was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts. The Legislature certainly did not intend to immunize police officers by precluding the use of their lies and false statements in criminal proceedings. Indeed, such a strained construction of MCL 15.393 would be wholly contrary to the Legislature's purpose in enacting the statute. In sum, the plain language of MCL 15.391(a) establishes that an "involuntary statement" includes only truthful and factual information. Quite simply, when an officer lies, he or she provides no "information." Accordingly, MCL 15.393 does not preclude the use of the officer's lies in a criminal proceeding. [*Hughes*, 306 Mich App at 130.]

Reference to "information provided by a law enforcement officer," MCL 15.391(a), in exchange for immunity, cannot reasonably be interpreted to mean simply any utterance of words; instead, it must reasonably be interpreted as meaning truthful information. Given that the obvious purpose of the statute at issue is to assist in the discovery of police misconduct, an indispensable element of the induced statement is that it be truthful so that it may—in fact or potentially—assist in such discovery. If the police officers who are questioned are allowed to provide false statements without consequence, i.e., without adversely affecting their guarantee of immunity, not only is the government not assisted in its responsibilities to investigate and punish police misconduct, but it may be affirmatively hindered or obstructed in this regard by the false statements, which indeed is exactly what occurred in the case at hand.[36] In

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[36] As one commentator explained:

> The state has a strong preference against allowing persons to lie with impunity, for lying prejudices the state in ways that neither silence nor truth-telling does. Silence with impunity may disable the state from acquiring information from a witness, but it has the virtue of leaving the state no worse off than if the witness had never existed. Truth-telling with impunity may

this case, after defendants stated that defendant Hughes did not have any improper physical contact with the complainant, the investigation was terminated and it was not revived until a year later and that was *only* because the person who had been assaulted by defendant Hughes hired a private investigator who later discovered the video recording of the assault. Allowing an officer to provide false statements and yet receive full immunity utterly defeats the obvious purpose of the statute and serves no comprehensible alternative purpose.[37] As a result, I believe that construing

disable the state from using a witness's statements against him criminally, but it enlightens the state and enables the state to use the information for all other purposes. In contrast, lying with impunity leaves the state worse off than it was before. Lying with impunity not only disables the state from using the lies as criminal evidence against the person, but it affirmatively misleads and confuses the state regarding the truth. Not surprisingly, the Court finds no place for lying:

> In [the] constitutional process of securing a witness'[s] testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings . . . . Congress has made the giving of false answers a criminal act punishable by severe penalties; [for] in no other way can criminal conduct be flushed into the open where the law can deal with it. [Westen, Answer Self-Incriminating Questions or Be Fired, 37 Am J Crim L 97, 123-124 (2010), quoting United States v Mandujano, 425 US 564, 576; 96 S Ct 1768; 48 L Ed 2d 212 (1976) (alterations in original).]

[37] The majority asserts that "the protections offered by the DLEOA are intended to encourage and facilitate officers' participation in internal investigations, with the goal of rendering those investigations more fruitful and effective." I fail to see how lies render investigations more fruitful and effective. Indeed, I believe that they have the very opposite effect—they hinder and thwart investigations. I do not believe that any reasonable Legislature could conceivably have wished to encourage police officers to lie during an internal investigation or even been disinterested in whether such lies took place. The majority posits that "[n]ot all statements, after all, are clearly true or entirely false, and the Legislature may have concluded that qualifying the DLEOA's statutory protections

the DLEOA in light of its obvious purpose—assisting in the discovery of police misconduct—strongly supports the conclusion that "information" presupposes "truthful information." Simply put, there is no reason to enact an immunity statute if it cannot produce "information" that is helpful in uncovering police misconduct. As the United States Supreme Court explained, "it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect." *Glickstein*, 222 US at 143. Similarly, I am not persuaded that the DLEOA protects false statements absent any "express and specific command to that effect," which the DLEOA does not contain. *Id*.

III. CONCLUSION

Because I agree with the Court of Appeals that neither the Fifth Amendment nor the DLEOA forbid the use of a law enforcement officer's false statements in a subsequent prosecution for obstruction of justice, I respectfully dissent and would affirm the judgment of the Court of Appeals.

VIVIANO, J., concurred with MARKMAN, J.

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based on veracity would unduly complicate the implementation of those protections or undermine the certainty and effectiveness of the protections offered." It is one thing to conclude that the Legislature intended to protect statements that were made by a person who at the time believed the statements to be true, even if it is subsequently determined that the statements were incorrect, but it is quite another thing to suppose that the Legislature intended to protect statements that were made by a person who at the time knew that his or her statements were false, which is what happened in the instant case. Given that the Legislature only extended protection to "compelled information," I simply cannot believe it intended to protect deliberate falsehoods. Deliberate falsehoods clearly do not constitute "compelled information."

PEOPLE v MARCH

Docket No. 151342. Argued on application for leave to appeal January 13, 2016. Decided June 23, 2016.

Timothy P. March was charged with committing larceny in a dwelling house, MCL 750.360, and receiving, possessing, or concealing stolen goods worth more than $200 but less than $1,000, MCL 750.535(4)(a), for removing fixtures from a home that had been sold to John Hamood at a sheriff's sale after a foreclosure proceeding. The home had been owned by defendant's father, who had given defendant a power of attorney that included the right to possess and dispose of his father's real property. Defendant took the fixtures from the home during the six-month period in which he could have redeemed the property under MCL 600.3240(8). Defendant moved to quash the information, arguing alternatively that a person could not commit larceny of a fixture and that he could not have wrongfully taken the property of another because he retained both legal title and the right of possession when the fixtures were removed. The court, Vera Massey Jones, J., initially denied defendant's motion, but, after the prosecution conceded that defendant had the right to possess the house during the redemption period, granted defendant's motion on reconsideration and dismissed the charges. The Court of Appeals, BORRELLO, P.J., and WILDER and STEPHENS, JJ., reversed and remanded in an unpublished opinion per curiam, issued December 4, 2014 (Docket No. 317697), holding that under *People v Sheldon*, 208 Mich App 331 (1995), an "owner" of property included not only the titleholder but also any person whose consent was necessary before property could be taken and that therefore Hamood was also an owner of the property. Defendant applied for leave to appeal. The Supreme Court ordered and heard oral argument under MCR 7.302(H)(1) on whether to grant defendant's application or take other peremptory action. 497 Mich 1041 (2015).

In a unanimous opinion by Justice MARKMAN, the Supreme Court *held*:

MCL 750.360 adopted the common law of larceny, which protects possessory rights. Because only defendant held posses-

sory rights in the fixtures at the time he removed them, and Hamood held no such rights, defendant could not have committed larceny as charged. Absent a proper larceny charge, the fixtures were necessarily not stolen goods, and the charge of receiving or possessing stolen goods therefore failed as well. The Court of Appeals judgment was reversed, and the trial court order dismissing the charges was reinstated.

1. Defendant was charged with larceny under MCL 750.360, which provides in part that any person who commits the crime of larceny by stealing in any dwelling house shall be guilty of a felony. The general crime of larceny is established in MCL 750.356, which provides in part that a person who commits larceny by stealing certain property of another, including money, goods, or chattels, is guilty of a crime. Michigan has no statutory definition of larceny, and all the statutes addressing larceny use the term's common-law definition. That definition can be parsed into the following elements: (a) a trespassory taking and (b) the carrying away (c) of the personal property (d) of another (e) with intent to steal that property. To these elements, MCL 750.360 added element (f): the taking occurring within the confines of the building.

2. At common law, "property of another" for purposes of larceny referred to property that someone other than the defendant had the right to possess as against the defendant at the time of the taking. While the Michigan Supreme Court had not yet expressly defined "property of another" for purposes of the larceny statutes, its caselaw as well as caselaw from the Court of Appeals comported with the common-law proposition that property constitutes the "property of another" when someone holds the right to possess it as against the defendant at the time of the taking. To determine whether another held such rightful possession, courts must examine the respective rights of all relevant individuals to the property and decide whether any of them held a right to possess the property as against the defendant at the time of the taking. This assessment requires courts to consult the statutes, contracts, caselaw, and other sources that give rise to the individuals' rights and define the relationship between those rights.

3. Defendant could not have committed larceny by taking the fixtures because, given that defendant had the right to possess the fixtures at the time of the alleged larceny, they did not constitute the "property of another." "Possession" is defined as the fact of having or holding in one's power the exercise of dominion over property, the right under which one may exercise control

over something to the exclusion of others, and the continuing exercise of a claim to the exclusive use of a material object. In general, possession is either actual or constructive. Fixtures intentionally annexed to real property become part of the mortgage security, and, upon foreclosure sale, title to them passes with the realty. Therefore, whatever rights Hamood had in the fixtures arose from his foreclosure purchase. A foreclosure-sale purchaser receives a deed at purchase that vests title at the end of the six-month redemption period if the mortgagor fails to redeem the property by paying the amount of the successful bid, interest on that amount, and various fees. The vesting of title confers on the purchaser those rights that existed at the time that the mortgage subject to foreclosure was executed as well as those the mortgagor held at any time thereafter under the relation-back doctrine. In these circumstances, because the purchaser is deemed to hold title retroactively, he or she can bring civil actions for damages done to the property during the redemption period; such actions may also be brought under MCL 600.3278. However, this interest is not a possessory right, let alone one that permits the purchaser to exclude the mortgagor from possession. Only after the mortgagor fails to redeem does the purchaser's interest ripen into a legal title and endow the purchaser with the right of possession. Hamood, as the foreclosure-sale purchaser, thus held equitable title to the property during the redemption period, which gave him no possessory rights. Defendant, by contrast, held the sole right to possess the property. Therefore, defendant could not, by taking the property, have trespassed upon the "property of another" because no one else had the right to possess it at that time. Consequently, defendant's actions did not constitute a trespassory taking of the "property of another" and did not constitute larceny under MCL 750.360. And because the property was not stolen, defendant did not receive, possess, or conceal stolen goods under MCL 750.535(4)(a).

4. The Court of Appeals erred by assuming that Hamood was the "owner" of the fixtures for purposes of larceny and thus that the fixtures were the "property of another" as against defendant by virtue of Hamood's supposed right to consent to their removal. An individual is not considered to "own" property because he or she may consent to its taking; rather, particular interests encompass the right to consent. Consent is an attribute or function of some property interests that is derived from a right to control the property, which in turn is an attribute or function of the right to possession of the property. The right to consent could not serve as a proxy for the right to possession because neither of the sources of legal authority on which the court relied gives rise to the right

to possession. MCL 600.3278 does not endow the purchaser with a possessory right, nor does the equitable title held by Hamood.

Court of Appeals judgment reversed; trial court order dismissing the criminal charges against defendant reinstated.

1. LARCENY — ELEMENTS.

MCL 750.360 provides that any person who commits the crime of larceny by stealing in certain buildings is guilty of a felony; the elements of the crime are (1) a trespassory taking and (2) the carrying away (3) of the personal property (4) of another (5) with intent to steal that property and (6) the taking occurring within the confines of the building.

2. LARCENY — DEFINITIONS — PROPERTY OF ANOTHER.

For purposes of larceny, the phrase "property of another" is property that someone other than the defendant had the right to possess as against the defendant at the time of the taking; to determine whether another held such rightful possession, courts must examine the respective rights of all relevant individuals to the property and consult the statutes, contracts, caselaw, and other sources that give rise to the individuals' rights and define the relationship between those rights.

3. LARCENY — FIXTURES ANNEXED TO REAL PROPERTY — FORECLOSED PROPERTIES — REDEMPTION PERIOD — RIGHT OF POSSESSION — MORTGAGORS.

A mortgagor who holds legal title to a foreclosed property that was subsequently purchased at a sheriff's sale has the right to possess the property and its fixtures to the exclusion of the purchaser during the statutory redemption period; the removal of fixtures from the property by the mortgagor during this period does not constitute larceny (MCL 750.360; MCL 600.3236).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

M. Michael Koroi for defendant.

MARKMAN, J. We consider here whether a homeowner, or another person rightfully possessing a home,

commits criminal larceny by removing fixtures from the home after it has been foreclosed on and sold at a sheriff's sale, but before the statutory redemption period has expired. The trial court concluded that such removal did not constitute larceny because defendant was in possession of the home and fixtures at the time. The Court of Appeals disagreed, finding that the foreclosure-sale purchaser's equitable interest in the home signified that the fixtures constituted the "property of another" at the time of their removal and that defendant therefore required the purchaser's consent before these could be taken.

We conclude that our larceny law prohibits the wrongful dispossession of property, protecting an individual's possessory interests from a wrongful taking. Because defendant held the exclusive possessory right in the home, including its fixtures, at the time of the alleged larceny, he could not have wrongfully dispossessed anyone else, including the foreclosure-sale purchaser, of rightful possession of that property. Accordingly, he could not have committed larceny of the fixtures. We therefore reverse the judgment of the Court of Appeals and reinstate the trial court's dismissal of the criminal charges.[1]

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[1] Despite the failure of the larceny charge in this case, it is possible that defendant's actions might properly give rise to alternative criminal offenses. The prosecutor here has indicated a belief that defendant may be guilty of at least two other offenses: embezzlement, MCL 750.181(1), and malicious destruction of property, MCL 750.380. We do not here opine on the applicability of either of these, or any other criminal offense, to defendant's conduct. Additionally, a foreclosure-sale purchaser such as Hamood is not without recourse, as he has various civil remedies. One is MCL 600.3278(1), which provides a foreclosure-sale purchaser with the right to pursue damages against a mortgagor who causes injury to the property during the redemption period. Another is the procedure set forth in MCL 600.3237 and MCL 600.3238, which enables the purchaser to inspect the property and institute summary

I. FACTS AND HISTORY

Defendant's father owned a home in Westland, Michigan, which secured a mortgage loan. In July 2011, he granted defendant a power of attorney that gave defendant the right "to possess, recover, manage, hold, control, develop, subdivide, partition, mortgage, lease or otherwise deal with any real property belonging" to his father. Additionally, defendant could "dispose of any real property" or personal property. Around this time, defendant's father also took up residence at an assisted-living home. Subsequently, the mortgage loan on the Westland home fell into default. The mortgagee eventually foreclosed, and on August 9, 2012, the home was sold at a sheriff's sale to John Hamood for $33,425.80.[2] On the sale date, a six-month redemption period commenced under MCL 600.3240(8), during which time defendant and his father could void the purchaser's deed by tendering full payment of the purchase price to Hamood. The property went unredeemed.

Hamood inspected the home on February 10, 2013, the day after the redemption period expired. Inside, he noticed various items missing, including kitchen cabinets, the kitchen countertop, a furnace, duct work,

proceedings for possession under MCL 600.5701 *et seq*. if the person then in possession is damaging the property. Moreover, the statute defines "damage" to include "[m]issing or destroyed structural aspects or fixtures." MCL 600.3238(11)(d). We also emphasize that the analysis in larceny cases such as the instant one relies heavily on the statutory or contractual framework establishing the individuals' respective rights in the property. The conclusion reached here is consequently limited to circumstances in which the mortgagor retains his possessory rights in the property during the redemption period and does not, for instance, contract them away.

[2] The affidavit of the foreclosure-sale purchaser indicates that Vonelle Ventures, LLC was the actual purchaser. It appears that Hamood operates and owns Vonelle.

interior doors, a hot water tank, and an exterior air conditioner. He contacted the police the same day, informing them of his findings, and they initiated an investigation that resulted in a search of defendant's home approximately two weeks later. The search uncovered many of the missing items, along with other fixtures that had apparently been removed.

Defendant was arrested and charged in a criminal information with two counts: committing larceny in a dwelling house, MCL 750.360, "by stealing counter tops, sink, furnace, doors, hot water heater, grab bars, [and] cabinets," and receiving, possessing, or concealing stolen goods worth more than $200 but less than $1,000, MCL 750.535(4)(a). In June 2013, defendant filed his first motion to quash the information, setting forth alternative arguments. First, he argued that fixtures were not the proper subject of larceny; that is, that one could not commit larceny of a fixture. Second, he argued that he could not have wrongfully taken property of another because he retained legal title and the right of possession throughout the redemption period, during which time the removal of the fixtures had occurred.[3] The latter argument was considered by the trial court, which denied defendant's motion, as well as a subsequent amended motion, on the basis that defendant had failed to prove a right to possession. Upon a motion for reconsideration, however, the prosecutor conceded that defendant had the right to possess the house during the redemption period. Consequently, the trial court granted defendant's motion for reconsideration and dismissed the charges.

[3] In a third argument, defendant contended that the record lacked any evidence that he had a felonious intent. The courts below did not address this contention, and we likewise decline to opine on defendant's intent, given that he prevails here regardless of his intent.

The Court of Appeals reversed, focusing on *People v Sheldon*, 208 Mich App 331, 333-334; 527 NW2d 76 (1995), for the proposition that the "owner" of property included not only the titleholder of that property, but also "any other person whose consent was necessary before the property could be taken." *Id*. (quotation marks and citation omitted). The Court determined that Hamood was an "owner" of the fixtures because his consent was necessary before these could be taken by defendant. *People v March*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2014 (Docket No. 317697), p 4. The Court inferred this right to "consent" from two sources. First, according to our caselaw, Hamood held equitable title to the property during the redemption period. Second, MCL 600.3278(1) provides purchasers such as Hamood a right of action against mortgagors who damage the foreclosed property during the redemption period. In light of these two sources of law, the Court concluded that "the items that defendant allegedly removed from the home were at least partially the 'property of another' " and therefore that "the trial court abused its discretion in dismissing the larceny and possession of stolen property charges against defendant . . . ." *Id*. The Court also held that fixtures are proper subjects of larceny because once severed they become personal property. *Id*. at 5. Accordingly, the Court reversed the trial court and remanded to the trial court for further proceedings.

We heard oral argument on the application under MCR 7.302(H)(1) on the following two questions:

> (1) whether the removal of fixtures by a mortgagor from the mortgaged premises after a sheriff's sale but prior to the expiration of the redemption period may subject the mortgagor to criminal liability for larceny; and (2) whether fixtures taken from real property may be the

> subject of larceny under MCL 750.356(1). [*People v March*, 497 Mich 1041 (2015).]

II. STANDARD OF REVIEW

A trial court's decision to quash an information is reviewed for an abuse of discretion. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). An abuse of discretion occurs when the trial court "chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). However, "[t]his Court reviews de novo questions of statutory interpretation." *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). Thus, "[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010), citing *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

III. ANALYSIS

We begin as always by examining the language of the relevant statute, MCL 750.360. As will become clear below, this language leads us in turn to the common-law background of larceny, which we then must also examine.

A. INTERPRETATION

The resolution of this case depends on the proper interpretation of MCL 750.360, which criminalizes larceny in a building. "The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent." *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009). The statute is the

touchstone for determining the Legislature's intent, for "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). We must give "plain meaning to the words actually used" in a statute. *People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012). Accordingly, when a statute fails to define a term, "we presume that the Legislature intended for the words to have their ordinary meaning." *People v Hardy*, 494 Mich 430, 440; 835 NW2d 340 (2013); see also MCL 8.3a.

When, however, an undefined term is one that has "a settled, definite, and well known meaning at common law," we will assume that the Legislature adopted that meaning "unless a contrary intent is plainly shown." *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921), superseded by statute on other grounds as recognized by *People v Smith-Anthony*, 494 Mich 669, 697 n 11; 837 NW2d 415 (2013); see also *People v Young*, 418 Mich 1, 13; 340 NW2d 805 (1983). "[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. Thus, common-law terms adopted in statutes will be applied in the same manner in which they were applied at the time they were codified. *People v Riddle*, 467 Mich 116, 125-126; 649 NW2d 30 (2002).

B. MCL 750.360

Our analysis then begins with the language of MCL 750.360, the statute under which defendant was charged with larceny:

> Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

The statute leaves larceny undefined, so we next turn to the so-called "simple larceny" statute, MCL 750.356, which implicates the "crime of larceny" referred to in MCL 750.360. *People v Adams*, 128 Mich App 25, 31-32; 339 NW2d 687 (1983) (labeling the statute as "simple larceny"). MCL 750.356 establishes the general crime of larceny:

> (1) A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> (b) A bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order, or certificate.
>
> (c) A book of accounts for or concerning money or goods due, to become due, or to be delivered.
>
> (d) A deed or writing containing a conveyance of land or other valuable contract in force.
>
> (e) A receipt, release, or defeasance.
>
> (f) A writ, process, or public record.
>
> (g) Scrap metal.

As this Court observed in addressing a predecessor to MCL 750.356, "[w]e have no statutory definition of larceny, and all our statutes use it in its common law sense." *Morrissey v People*, 11 Mich 327, 336 (1863). More recently, the Court of Appeals reiterated this proposition: "There is no statutory definition of larceny in Michigan and all statutes use the term in its

common-law sense." *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967); see also Saltzman, Michigan Criminal Law: Definitions of Offenses (2d ed), § 7-2(a), p 528 ("Since 'larceny' is not defined by the statute, Michigan law begins with the common law definition."). This observation remains true today, as the larceny statute has retained the same general formulation since it was first enacted in 1838 shortly after statehood. 1838 RS, part 4, tit I, ch 4, § 17 ("Every person who shall commit the offence of larceny, by stealing of the property of another[,] any money, goods or chattels," shall be punished.).[4] Indeed, we have continued without interruption to interpret larceny statutes in light of their common-law heritage. See, e.g., *Smith-Anthony*, 494 Mich at 676-679.

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[4] Subsequent statutes mirror this definition, with only immaterial distinctions in phrasing. See, e.g., 1846 RS, ch 154, § 18 ("Every person who shall commit the offence of larceny, by stealing of the property of another, any money, goods or chattels . . . ."); 1882 CL, ch 318, § 9140 (same but for spelling of "offense"); 1897 CL, ch 320, § 18 (same); 1915 CL, ch 257, § 17 ("Every person who shall commit the offense of larceny by stealing from the person of another . . . ."); MCL 750.356 (1948) ("Any person who shall commit the offense of larceny, by stealing of the property of another, any money, goods or chattels . . . ."); MCL 750.356 (1970) ("Any person who shall commit the offense of larceny, by stealing, of the property of another, any money, goods or chattels . . . ."). Indeed, the current statute reflects even earlier statutes defining larceny in the Northwest Territory. In 1795, the territorial government adopted Pennsylvania's larceny statute, which punished those who had "feloniously stolen any money, goods or chattels . . . ." A Law for the Trial and Punishment of Larceny, June 5, 1795, Laws of the Territory of the United States North-West of the Ohio (1796), p 41. After Michigan became an independent territory, it enacted a statute in 1818 proscribing larceny: "if any person shall steal any money, goods, or chattels, . . . [that person] shall be fined . . . or whipped . . . ." 2 Territorial Laws, Act of July 27, 1818, § 1, p 138. Thus, the current statute tracks the original larceny enactments dating back two centuries, all of which left larceny undefined.

This Court has relied on that common law to establish the general elements of simple larceny: "[A]t common law simple larceny was defined as 'the felonious taking, and carrying away, of the personal goods of another.' " *People v Randolph*, 466 Mich 532, 542-543; 648 NW2d 164 (2002), quoting 4 Blackstone, Commentaries on the Laws of England, p *229.[5] We have also described larceny as the "unlawful taking of the personal property of another with the felonious intent to deprive the owner of it." *People v Johnson*, 81 Mich 573, 576; 45 NW 1119 (1890).

These articulations of the common law can be parsed in turn into the following elements: (a) a trespassory taking and (b) the carrying away (c) of the personal property (d) of another (e) with intent to steal that property.[6] To these elements, MCL 750.360, the statute addressing larceny in a building, adds one further element: (f) "the taking . . . occurr[ing] within the confines of the building." *Randolph*, 466 Mich at 552 n 25.

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[5] *Randolph* was superseded by statute on other grounds as recognized by *Smith-Anthony*, 494 Mich at 686 n 50.

[6] This definition mirrors those found in numerous treatises. In one leading work, larceny is defined as "the (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it." 3 LaFave, Substantive Criminal Law (2d ed), § 19.2, p 62; see also Saltzman, § 7-2(a), pp 528-529. Sir Edward Coke stated that "[l]arceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the meere personall goods of another . . . ." 3 Coke, Third Part of the Institutes of the Laws of England (1797), p 107. See also 1 Hale, History of the Pleas of the Crown (1800), p 503 (using Coke's definition); 1 Hawkins, Treatise of the Pleas of the Crown (1716), p 89. An even older source defined the offense as "the treacherous taking of a corporeal movable thing of another, against the will of him to whom it belongs, by evil acquisition of possession or of the use." Horn, The Mirror of Justices (1895 Selden Society ed), p 25. See also 3 Torcia, Wharton's Criminal Law (15th ed), p 347 ("At common law, larceny is the trespassory taking and carrying away of the personal property of another with the intent permanently to deprive.").

Therefore, the prosecutor must prove each of these six elements in order to obtain a conviction.[7]

The dispute in the present case centers on element (d), whether the fixtures defendant took constituted the "property of another."[8] Accordingly, to resolve this case, we must determine the meaning of the term "property of another," specifically, the nature of the interest protected by larceny—that is, whether "property of another" means property in which "another" has a proprietary, possessory, or some other type of property interest. The parties disagree as to whether Hamood's interest during the redemption period was sufficient to transform the fixtures into the "property of another" with respect to defendant. Our six-element definition of larceny does not, on its face, yield a

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[7] The Court of Appeals has formulated an essentially identical test for larceny:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*Anderson*, 7 Mich App at 513, 516.]

While this phrasing contains the term "owner," as we will explain, it is used here with imprecision, and in the broader context of the development of the common law of larceny in Michigan, it should not be read to suggest that the law of larceny protects only those who hold title or an equitable interest in property. Rather, the law of larceny focuses on the wrongful dispossession of property; that is, the law of larceny protects possessory rather than proprietary interests. Thus, to be precise, we employ the more traditional phrasings referring to "property of another" and "trespassory" takings, rather than the words "owner" and "consent."

[8] For purposes of this appeal, the parties do not dispute that defendant removed and carried away the property in controversy or that the alleged larceny occurred in a "building" for purposes of MCL 750.360. Nor do they dispute the property's characterization as "fixtures," at least before their severance from the house.

definite resolution of this issue because it does not address the nature of the interest that "another" must have in the property. We must then turn to larceny's common-law background to explain the classes of interests that constitute the "property of another" protected by larceny laws against "trespassory" takings.

C. "PROPERTY OF ANOTHER" AT COMMON LAW

At common law, "property of another" referred to property that "another" had the right to possess as against the defendant at the time of the taking. In other words, if at the time of the taking someone other than the defendant had the right to possess the property to the exclusion of the defendant, then it constituted the "property of another." It followed that if the defendant had the right to possess the property as against the complainant at the time of the taking, no larceny could occur.

The focus on protection of possessory rights is first reflected in the prohibition of *trespassory* takings, which forms the core of larceny's common-law roots. As noted, common-law larceny was defined as the "unlawful taking of the personal property of another with the felonious intent to deprive the owner of it." *Johnson*, 81 Mich at 576. It was the unlawful, or trespassory, "taking" that defined the fundamental nature of the crime: "[t]he principal factor which limited the scope of larceny was the requirement that the thief must take it from the victim's possession; larceny requires a 'trespass in the taking,' as the matter is often stated." 3 LaFave, Substantive Criminal Law (2d ed), § 19.1(a), p 57. Or as another scholar noted, the "change of possession has from the earliest times been essential to larceny; so that there can be no larceny where there is no trespass." 3 Holdsworth, A History of English Law

(1923), p 361 (citations omitted); see also Hall, *Theft, Law and Society* (2d ed, 1952), p 6 ("Trespass as an essential element of larceny simply meant taking a chattel from one who had possession of it.").

In order for the taking to be trespassory, the goods taken had to be the "property of another." An early-nineteenth-century treatise expressed this idea by emphasizing the victim's possessory rights: "the goods, when taken, must be either actually or constructively in the possession of another . . . ." 1 Robinson, Introduction of a Justice of the Peace to the Court of Quarter Sessions of the Peace (1836), p 107. Another nineteenth-century treatise expounded on this point, distinguishing proprietary rights and possessory rights and asserting that the latter were protected from criminal misappropriation by the crime of larceny: "the misappropriation of property operates not by transferring proprietary rights, but by transferring the power of actual enjoyment of those rights, *i.e.* by dealing with the possession or custody of the thing to which they are attached . . . ." 3 Stephen, History of the Criminal Law of England (1883), at 124.[9] Simply put, "larceny is committed by a wrongful taking from one who has rightful possession." *State v Jackson*, 251 Iowa 537, 542; 101 NW2d 731 (Iowa, 1960); see also 2 Pollock & Maitland, History of English Law Before the

[9] We use Stephen's terminology in this opinion to distinguish between "proprietary" and "possessory" rights. We will define the latter term below, but here we take the opportunity to note that we use proprietary rights in distinction to possessory rights to mean all formal interests in property, such as legal title, equitable interests, or future interests. See *Black's Law Dictionary* (10th ed) (defining "proprietary" as, among other things, "[o]f, relating to, or holding as property"). While the right to possession may well accompany some of these interests, such a right may be independent of them as well, arising from other sources, such as a bailment. And at times, these proprietary rights may not endow the person who holds them with the immediate right to possess the property.

Time of Edward I (2d ed, 1898), p 498 ("The crime involves a violation of possession . . . ."). Thus, larceny at common law protected principally against wrongful *dispossessions* of personal property.[10]

What makes the dispossession wrongful is that the person from whom the property is taken holds the right to possess it *as against* the defendant at the time of the taking. This aspect of the definition of "property of another" is reflected by two rules developed by the courts: (a) an individual in the rightful possession of property could not steal it; and (b) anyone in the rightful possession could be viewed as the "owner" for purposes of larceny.

The first rule is that a person in the rightful possession of property cannot steal it. See LaFave, §§ 19.1 and 19.2. "[Larceny] is an offence *against* a possessor and therefore can never be committed *by* a possessor." Pollock & Maitland, p 498 (emphasis added). Thus, for example, "where a man has goods in his possession

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[10] The common law's protection of possession is explained by a similar rationale to that justifying larceny as a criminal offense: to prevent breaches of the peace. As the United States Supreme Court has observed:

> In the 13th century, larceny was limited to trespassory taking: a thief committed larceny only if he feloniously "took and carried away" another's personal property *from his possession*. The goal was more to prevent breaches of the peace than losses of property, and violence was more likely when property was taken from the owner's actual possession. [*Bell v United States*, 462 US 356, 358; 103 S Ct 2398; 76 L Ed 2d 638 (1983).]

A substantial body of literature supports the notion that the law of larceny was intended to prevent breaches of the peace. Green, *13 Ways to Steal a Bicycle* (Cambridge: Harvard University Press, 2012), p 77; Steel, *Taking Possession: The Defining Element of Theft?*, 32 Melb U L Rev 1030, 1038-1039 (2008); Douglass, *Rethinking Theft Crimes in Virginia*, 38 U Rich L Rev 13, 17 (2003); Fletcher, *The Metamorphosis of Larceny*, 89 Harv L Rev, 496, 497-498 (1976).

by reason of a bailment, he cannot take them feloniously, being in possession . . . ." *Carrier's Case*, YB 13 Edw IV, f 9, pl 5 (1473); see also *Fitch v State*, 135 Fla 361, 366; 185 So 435 (1938); Hall, pp 6-7; Fletcher, *The Metamorphosis of Larceny*, 89 Harv L Rev 469, 481-482 (1976). Even if the bailee absconded with the property during the bailment, that taking would not constitute larceny under the common law; because the bailee had acquired and maintained rightful possession of the property at the time of the taking, the property was not that "of another," and the taking therefore did not trespass upon another's right to possess the property as against the bailee. See *Metamorphosis of Larceny*, 89 Harv L Rev at 475 (explaining that, under common-law larceny, a bailee, or anyone in rightful possession of property, was endowed with a sort of "possessorial immunity" such that "those who acquired possession over chattels were not subject to criminal liability for subsequent misappropriation").

The second common-law rule is related to the first: one in the rightful possession of property, such as a bailee, could be considered the "owner" as against anyone else who took the goods from his possession. Because, as Lord Blackstone explained, bailees had "immediate possession," they were "entitled to an action . . . on account of [their] immediate possession . . . ." Blackstone, p *396; see also Matthews, *Digest of the Law Relating to Offences Punishable by Indictment, and by Information in the Crown Office* (1833), pp 300-301 (noting that the "bailee, pawnee, lessee for years, carrier, or the like" could be characterized as the owner in a larceny indictment). As one scholar has noted, either the bailor or bailee could be considered the "owner" for purposes of larceny because the "property is still in" the true owner, but the bailee "hath the possession . . . and hath the property against

all the world but" the true owner. 1 Hale, History of the Pleas of the Crown (1800), p 512. With respect to the thief then, the stolen goods were the "property of another," because both the bailor and bailee held possessory rights as against the thief. Coke, pp 107-108; Robinson, pp 119-120. Further, because the bailee held rightful possession, even the true owner could be charged with larceny of his own goods if these were taken from the bailee during the bailment. Blackstone, p *231; Hale, p 513. Lord Coke linked this conclusion to the term property "of another": the owner could "commit larceny" of goods bailed or loaned to another "by the felonious taking and carrying them away, and in judgement of law he is said in this case to take the goods of another" because the "bailee hath [a right to possession], or a speciall property." Coke, p 110; see also LaFave, § 19.4(c), p 85 ("Sometimes the property which *A* owns is in the lawful possession of *B*, who has a pledge or lien interest . . . . From *A*'s viewpoint such property is considered the 'property of another for purposes of larceny . . . .' ").

Taken together, these rules communicate that "property of another" requires that someone other than the defendant holds the right to possess the property to the exclusion of the defendant at the time of the taking. To determine whether "another" holds such a possessory right, courts employing the common law have engaged in an examination and comparison of the property rights held by the defendant and other relevant parties when the taking occurred, looking to various rights-defining sources such as statutes to inform that assessment. See, e.g., *People v Zinke*, 76 NY2d 8, 10-14; 556 NYS2d 11; 555 NE2d 263 (1990) (noting that the legislature codified the common-law definition of "property of another" and relying on statutes to determine relevant property rights); *Murphy v State*, 453 NE2d 219, 221

(Ind, 1983) ("The rights to be examined in determining whether or not a theft has been committed are the rights of the person in possession of the property and the rights of the person who took such possession from him."); see also 50 Am Jur 2d, Larceny, § 25, p 36 ("[T]he key to answering the question of which person has the greater right to possession of the property is who, *at the time of commission of the offense*, had the greater right to possession of the property.") (emphasis added); Peterson, *Georgia Law of Theft*, 12 Mercer L Rev 308, 308 (1961) (noting that because the taking was out of another's possession, "it became important to determine in whom lay rightful possession").

D. MICHIGAN LAW

Our state's caselaw reflects the common-law notion that the "property of another" requirement for larceny contemplates protecting the possessory rights of "another" who at the time of the taking holds a right to possess the property as against the defendant. As a result, a person in rightful possession of the property at the time of the taking cannot commit larceny by taking that property.

This Court has made clear that establishing larceny as a crime was intended to protect possession. One of the ways we have done so is by recognizing that the law of larceny prohibits trespassory takings. As noted above, "trespass" at common law "simply meant taking a chattel from one who had possession of it." Hall, p 6. If there is no trespass because the defendant initially received possession lawfully, then larceny has not occurred. For this reason, in *People v Taugher*, 102 Mich 598, 601; 61 NW 66 (1894), this Court overturned a larceny conviction in which the defendant's "possession was lawful until the [owner's] demand" for return

of the property. In a similar vein, this Court has recognized that "larceny was not the proper charge at common law if a person lawfully acquired possession of property belonging to another and subsequently converted it to his own use." *People v Christenson*, 412 Mich 81, 86 n 3; 312 NW2d 618 (1981). This is because if, when the taking occurred, the defendant had a right to possess the property, it was not the "property of another" in the relevant sense at the necessary time. Thus, our caselaw, as with the common law, prohibits trespassory takings that deprive an individual of rightful possession of property. Those, on the other hand, who come into the possession of property lawfully have not committed larceny because the taking and possession were not wrongful at their inception.

More directly, we have declared that possession, and not title ownership, is the determinative requirement in larceny crimes. In *Christenson*, 412 Mich at 87, we observed, "As with common-law larceny, larceny by conversion [MCL 750.362] is a crime against possession and not against title . . . ." This statement not only communicates that the law of larceny protects an individual's possessory rights, but further supports the proposition that property is "of another" when someone other than the defendant has a right to possess that property as against the defendant, regardless of whether that person possesses title to it. 50 Am Jur 2d, Larceny, § 18, p 29 (citing *Christenson* in support of this specific rule); Tiffany, A Treatise on the Criminal Law of the State of Michigan (5th ed, 1900), p 915 ("The person alleged in the indictment to be the owner must, also, have, at the time of the taking, either the actual or constructive possession of the goods.").[11]

[11] Other cases involving related crimes give further support to this interpretation. See, e.g., *People v Gould*, 384 Mich 71, 80; 179 NW2d 617

The Court of Appeals has expressed the same idea, although sometimes attended by the problematic term "owner," suggesting wrongly that only proprietary rights are protected. Despite this, the Court has accurately explained the rightful-possession requirement. As one opinion stated, "For purposes of larceny, the 'owner' is the person who has rightful possession and control of the property." *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993), remanded for resentencing on other grounds 445 Mich 918 (1994). One particularly thoughtful decision in this regard is *People v Hatch*, 156 Mich App 265; 401 NW2d 344 (1986), in which an owner left his boat for repairs at a marina, from where it was later stolen. *Id*. at 266. At trial, a dispute occurred concerning the evidence necessary to prove that the taking was contrary to the owner's will, with the trial court granting a motion to strike the boat's owner as a res gestae witness, i.e., one who was "witness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *Id*. at 266-267. The trial court granted the motion to strike, and the Court of Appeals affirmed, explaining that the "owner" for purposes of the alleged larceny was the marina manager who was in rightful possession of the boat at the time it was taken. *Id*. at 267-268. This result reflects the common law of larceny, which pro-

(1970) (noting that it was sufficient under MCL 750.357, the statute addressing larceny from a person, for the taking to have been from the victim's possession); *Durand v People*, 47 Mich 332, 334; 11 NW 184 (1882) (noting, in a case of assault with intent to rob, that "[a]s against a wrong-doer an actual possession or custody of the goods would be sufficient"); *People v Hooks*, 139 Mich App 92, 96; 360 NW2d 191 (1984) (citing *Durand* to support the possession requirement in a criminal charge for receiving stolen property).

tected persons rightfully possessing property, whether they owned the property or not.

Further supporting this conclusion is this Court's decision in *People v Jacks*, 76 Mich 218; 42 NW 1134 (1889), which *Hatch* cited. In *Jacks*, we held that "the fact of non-consent to the taking may . . . be proved by any other person having knowledge of the facts as well as by the owner or *the person having control of the property at the time* . . . ." *Id*. at 221 (emphasis added). This suggests that larceny can occur by the dispossession of a rightful possessor of the property, even if that person is not the title owner. It is thus reasonably well established that the rightful possessor of property can constitute its "owner" for purposes of larceny. Or, more accurately, the property is "of another" if another rightfully possesses it.[12]

Our caselaw has also recognized that in order to constitute "property of another," "another" must hold rightful possession as against the defendant at the time of the taking. In *People v Long*, 50 Mich 249; 15 NW 105 (1883), for instance, the defendant's buggy was held by a man named William Gilbert pursuant to a lien. *Id*. at 250. This Court held that the defendant, although the true owner, was guilty of larceny where he had "secretly removed" the buggy from Gilbert's possession. *Id*. "Gilbert had a lien upon the buggy . . . and was *rightfully in possession*." *Id*. at 251 (emphasis added). Accordingly, this Court upheld the larceny conviction. *Id*.

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[12] *Sheldon*, 208 Mich App at 334 ("Larceny is not limited to taking property away from the person who holds title to that property, but also includes taking property from a person who has rightful possession and control of the property."); *Hooks*, 139 Mich App at 96 ("[I]t is well-settled that a larceny can be committed by a wrongful taking from a person in actual possession or custody of the goods taken; ownership need not be show[n].").

By noting that Gilbert "rightfully" possessed the buggy, we recognized that the buggy was the "property of another," with respect to the defendant, even though the defendant was the title owner. In other words, Gilbert's rightful possession by virtue of the lien gave him the right to possess the buggy as against the defendant. And the defendant, regardless of any rights that might have inhered in him as title owner, lacked the right to possess the buggy as against Gilbert at the time of the taking. Therefore, by taking the buggy, the defendant took the "property of another" and was guilty of larceny.

The same reasoning runs through Court of Appeals cases, the most prominent of which is *People v Sheldon*, 208 Mich App 331, relied on by the Court of Appeals in the instant case. In *Sheldon*, as in *Long*, the larcenist owned the property he stole, which consisted of two impounded Cadillacs held at a car lot. *Id*. at 333-334. He was charged with two counts of simple larceny, MCL 750.356, which the trial court quashed because the lot did not own the cars. *Id*. The Court of Appeals disagreed, citing *Hatch*, 156 Mich App at 267, and Model Criminal Jury Instruction 22.2 to establish that the "owner" for purposes of larceny was not necessarily the title owner. Instead, it noted that the owner could be the " 'actual owner' " or " 'any other person whose consent was necessary before the property could be taken.' " *Sheldon*, 208 Mich App at 334-335, quoting M Crim JI 22.2. The Court did not engage in an analysis of the lot's right to consent in the abstract, but grounded its analysis in whether the lot had a right to possess the cars. *Id*. at 334-337. Specifically, the Court stated that the relevant question was "whether the wrecker service enjoyed a *right of possession* sufficient to support a larceny charge at the time the vehicles were removed from the wrecker service's

possession." *Id*. at 334 (emphasis added). To determine this, the Court examined the legal authority for the lot's possession of the two cars. As to one of these, the court determined that the owner's right to possess the car was conditioned on the payment of certain impoundment fees. *Id*. at 336. Therefore, the defendant "did not have the right to remove the vehicle . . . until such time as he paid the impoundment fees or posted a bond," and unauthorized removal could constitute larceny. *Id*. Concerning the second car, there was no evidence that it had been lawfully impounded, and the larceny charge in connection with its taking was quashed.

Accordingly, *Sheldon*, as with *Long*, comports with the common-law proposition that property constitutes the "property of another" when someone holds the right to possess it as against the defendant at the time of the taking. In order to reach this conclusion, *Sheldon* canvassed the relevant statutes defining the rights of the respective parties in the property at the time of the taking and assessed with whom rightful possession of the property lay—an analysis consistent with the common-law approach discussed previously. See, e.g., *Zinke*, 76 NY2d at 10-14.[13]

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[13] A similar comparison-of-rights approach can be found in Michigan caselaw addressing whether, for purposes of armed robbery, the defendant engaged in "a felonious taking of property from the victim's presence or person." See *People v Rodgers*, 248 Mich App 702, 707-708; 645 NW2d 294 (2001) (finding an illegal taking where the defendant did not argue he had the right to possess "when compared to [the victims']" right to possess); see also *People v Jones*, 71 Mich App 270, 272; 246 NW2d 381 (1976) (noting that the victim had the right to handle the property taken at the time of the taking); *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976) (finding that the victim had a right to possess the goods taken as against the defendant); *People v Needham*, 8 Mich App 679, 685; 155 NW2d 267 (1967) (same).

In summary, while this Court has not yet had specific occasion to expressly define "property of another" for purposes of the larceny statutes, our caselaw reflects the common-law definition described above: "property of another" is any property in which "another" individual holds the right to possess as against the defendant at the time of the taking. To determine whether "another" had such rightful possession, courts must examine the respective rights to the property. This examination requires courts to determine both the rights of all relevant individuals to the property and whether any of those individuals held a right to possess the property as against the defendant. To undertake this examination, courts should consult pertinent statutes, ordinances, contracts, caselaw, and the like that give rise to the individuals' rights and define the relationship between those rights, as the statutes did in *Sheldon*.

IV. APPLICATION

To apply these rules in the instant case, we must determine the parties' respective interests in the property during the redemption period. As demonstrated, for defendant to have properly been charged with larceny, the facts must demonstrate that defendant, in removing the fixtures, took the "property of another." And for the fixtures to have been the "property of another," someone other than defendant—in this case, Hamood—must have held the right to possess the property to the exclusion of defendant at the time of the taking. Hamood could hold such an interest only from his purchase at the foreclosure sale. In our judgment, no possessory rights inhered in Hamood as a result of the sale. Defendant, on the other hand, retained the exclusive possessory rights in the fixtures

during the redemption period. It therefore follows that defendant could not commit larceny under the circumstances of this case.

A. RESPECTIVE RIGHTS

In order to ascertain the parties' rights to possession, it is first necessary to briefly define possession. "Possession" is defined as " '1. [t]he fact of having or holding property in one's power; the exercise of dominion over property. 2. [t]he right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.' " *People v Flick*, 487 Mich 1, 12; 790 NW2d 295 (2010), quoting *Black's Law Dictionary* (7th ed).[14] In general, "possession is either actual or constructive." *Id*. at 14. " '[A] person has constructive possession if he "knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . ." ' " *Id*., quoting *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989) (citation omitted). "[B]are access" to the property "is not enough to constitute possession" for purposes of larceny offenses. *People v Gill*, 12 Mich App 383, 386; 163 NW2d 14 (1968). See also *People v Manning*, 38 Mich App 662, 666-667; 197 NW2d 152 (1972) (noting that possession

[14] Our reliance on this general definition of "possession" here should not be taken to suggest that in order to have rightful possession for purposes of larceny a party must have the right to possess the property to the complete exclusion of any and every other party. Indeed, multiple individuals can hold possessory rights in the same property at the same time, as do, for example, partners and joint tenants. See LaFave, § 19.4(c), p 85. Rather, as discussed earlier, the relevant inquiry in the larceny context is whether the party from whom the property was taken had, at the time of the taking, the right to possess it as against the defendant.

requires the defendant to have been given dominion over the property, not simply custody).

Turning to the present case, the parties do not dispute that the items taken were fixtures subject to the foreclosed-on mortgage. Fixtures intentionally annexed to real property "bec[o]me part of the mortgage security, and, upon foreclosure sale, title [to them] passe[s] with the realty." *Sequist v Fabiano*, 274 Mich 643, 646; 265 NW 488 (1936). Thus, whatever rights the complainant had in the fixtures arose from his purchase.

A foreclosure-sale purchaser receives a deed at purchase, which vests title at the end of the redemption period if the mortgagor fails to redeem. The deed is described in MCL 600.3236 as follows:

> Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall *thereupon become operative*, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby. [Emphasis added.]

Following the sale, the mortgagor has a period of time during which to redeem the property by paying the amount of the successful bid, interest on that amount, and various fees. MCL 600.3240(1) and (2). If the property is not redeemed within that period—six months in this case, MCL 600.3240(8)—the title to the

deed becomes "operative" and vests in the purchaser under MCL 600.3236. The vesting confers on the purchaser "those rights that existed at the time that the mortgage subject to foreclosure was executed," *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 223; 821 NW2d 503 (2012), as well as those the mortgagor held "at any time thereafter," MCL 600.3236. In other words, the purchaser has "the right to have the estate which he purchased . . . ." *Stout v Keyes*, 2 Doug 184, 187 (1845); see also *Sanford v Cahoon*, 63 Mich 223, 226; 29 NW 840 (1886) ("If redemption was not made . . . the title of the purchaser became absolute, and related back to the time of sale."); see also *Stout*, 2 Doug at 187-188 ("[I]f not defeated by redemption, [title] related back to the time of the purchase . . . ."). This is understandably known as the "relation-back" doctrine. *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 593; 848 NW2d 425 (2014). Because in these circumstances the purchaser is deemed to hold title retroactively, he can pursue civil actions for damages done to the property during the redemption period. MCL 600.3278; *Stout*, 2 Doug at 187-188.

The purchaser's rights during the redemption period have been variously described as an inchoate or contingent equitable interest, but it has never been suggested that this interest constitutes a possessory right, let alone one that permits the purchaser to exclude the mortgagor from possession. This Court has held that the purchaser acquires "an inchoate right to the land," subject to defeat by redemption. *Stout*, 2 Doug at 187. The purchaser's right to absolute title is "consummated" only if the premises go unredeemed. *Id*. During the redemption period, the deed "was in the nature of an escrow; and, if not defeated by redemption, related back to the time of the purchase . . . ." *Id*. at 187-188. More recent cases summarily label the purchaser's

interest as "equitable." As we explained in *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1926):

> A foreclosure of a mortgage extinguishes it. When the amount due under the mortgage is paid to the mortgagee by the purchaser at the sheriff's sale, the lien is destroyed, and the purchaser becomes the owner of an equitable interest in the mortgaged premises which ripens into a legal title if not defeated by redemption as provided by law. It is not a "lien, incumbrance or mortgage" which the purchaser at a foreclosure sale acquires, but it is an interest or title, equitable in character, and with nothing to be done on his part to make it absolute if it is not redeemed within the period of time prescribed by law.

This represents the prevailing characterization of the purchaser's interest. See, e.g., *In re Receivership of 11910 South Francis Rd*, 492 Mich at 223. Thus, only after the mortgagor fails to redeem does the purchaser's interest "ripen[] into a legal title[.]" *Dunitz*, 236 Mich at 49.

During the pendency of the redemption period, the purchaser's rights and responsibilities are considerably circumscribed, with the purchaser entitled to few, if any, of the rights accompanying ownership. Most relevantly for purposes of larceny, the purchaser lacks *possessory* rights, which continue in the mortgagor until the period expires. As early as 1936, we remarked upon "the definite and continuous policy of this State to save to mortgagors the possession and benefits of the mortgaged premises, as against the mortgagees, until expiration of the period of redemption." *Mass Mut Life Ins Co v Sutton*, 278 Mich 457, 461; 270 NW 748 (1936).[15]

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[15] This policy proceeded from an 1843 statute, 1843 PA 62, "inhibiting the action of ejectment [by the mortgagee] until after a foreclosure of the

Our most recent discussion of the purchaser's rights took place in *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653; 575 NW2d 745 (1998), in which a real-estate agent showing foreclosed property during the redemption period was injured in a fall at the property and brought a premises liability action against the foreclosure-sale purchaser. *Id*. at 655-658. Because an action for premises liability is conditioned on the defendant's possession and control of the land, we examined whether the purchaser had possession:

> [T]he bank [which purchased the property] had no legal right of possession during the six-month redemption period. It is certainly true . . . that the Hineses, as mortgagors, had the authority to place the mortgagee-bank in possession of the premises. However, we have consistently given careful scrutiny to any transaction in which a mortgagor waives its statutory right of redemption. [*Id*. at 660.]

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mortgage, and the expiration of the time of redemption . . . ." *Mundy v Monroe*, 1 Mich 68, 70 (1848). That statute currently is codified at MCL 600.2932(2), which states that "[n]o action may be maintained [for ejectment] by a mortgagee, his assigns, or representatives for recovery of the mortgaged premises, until the title to the mortgaged premises has become absolute." We have consistently interpreted the statute as providing that a "mortgage gives no right of possession until foreclosure and sale" and expiration of the redemption period. *Hogsett v Ellis*, 17 Mich 351, 363 (1868). See, e.g., *Nusbaum v Shapero*, 249 Mich 252, 257; 228 NW 785 (1930) ("The law is well settled in this State that, as a rule, a mortgagee may not divest the mortgagor of possession of mortgaged premises until the title thereto shall have become absolute upon foreclosure of the mortgage."); *Hazeltine v Granger*, 44 Mich 503, 505; 7 NW 74 (1880) (noting that the 1843 law was to "prevent the mortgagee from obtaining under his mortgage any interest beyond that of a security to be enforced only by sale on foreclosure, and to debar him from any right of possession"); *Wagar v Stone*, 36 Mich 364, 367 (1877) ("[U]ntil the title [in the foreclosure-sale purchaser] shall have become absolute upon a foreclosure of the mortgage . . . the mortgagor has a clear right to the possession and to the income which he may derive therefrom . . . .").

Instead, we reaffirmed the " 'definite and continuous policy' " of ensuring the mortgagor's possession during the redemption period. *Id*. at 660, quoting *Sutton*, 278 Mich at 461. Consequently, "a mortgagee can obtain possession" during that period, "but only for consideration . . . and pursuant to an explicit agreement." *Id*. at 661 (citations omitted). We concluded:

> The fact that the bank was the high bidder at foreclosure proceedings did not grant it any rights of ownership or possession, but, rather, gave the bank a contingency interest in the property with respect to title ownership. Accordingly, any interest the bank had would not vest until after expiration of the redemption period. [*Id*.]

Similarly, the statutory framework addressing the purchaser's rights during the redemption period supports the conclusion that purchasers lack possessory rights. The Legislature has crafted a limited set of rights purchasers may enjoy during the redemption period; none of these suggests that the Legislature intended to grant the purchaser possessory rights. Following the sale, the purchaser can conduct inspections of the property only by complying with the numerous provisions in MCL 600.3237 and MCL 600.3238.[16] For example, the purchaser may only inspect the inside of the property once, unless there is evidence that the property is being damaged. MCL 600.3238(4). A formal series of steps must be taken before the purchaser can begin summary proceedings under MCL 600.5701 *et seq*. for immediate possession of the premises. MCL 600.3238(5) through (11). These provisions each severely constrain any rights the purchaser might have to possess or even access the property.

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[16] These sections were enacted following the events in this case, 2014 PA 125, but they seem to confirm what is made manifest in the prior caselaw: purchasers *lack* immediate possessory rights.

These authorities compellingly indicate that the foreclosure-sale purchaser has no possessory interest in the property during the redemption period, while the mortgagor retains possessory rights. To the extent that rights or responsibilities inhere in the purchaser as a result of events during that period, these arise only retroactively under the relation-back doctrine. That doctrine, however, does not invest the purchaser with possessory rights or with any other interests during the period itself. At that time, the purchaser holds no possessory rights on which the mortgagor could trespass. Indeed, courts applying our precedent have found that it is the *purchaser* who could, in fact, commit a trespass against the mortgagor during the redemption period. See, e.g., *Kaczmarek v JPMorgan Chase, NA*, opinion of the United States District Court for the Eastern District of Michigan, issued June 11, 2012 (Case No. 2:11-CV-15214), pp 5-7. In short, the purchaser lacks possessory rights and the mortgagor enjoys possessory rights during the redemption period.

B. RESOLUTION

The above analysis leads to the conclusion that defendant here could not have committed larceny of the fixtures because he had the right to possess the house, and thus also its fixtures, at the time of the alleged larceny. Larceny can occur only when personal "property of another" has been taken by trespass. To constitute "property of another," the "goods, when taken, must be either actually or constructively in the possession of another[.]" Robinson, p 107. Moreover, the person with possession must have the right to possess the property to the exclusion of the defendant. *Long*, 50 Mich at 251; *Sheldon*, 208 Mich App at 334-336. It follows that one in

"lawful possession" of the property cannot take by trespass the "property of another."

This means that for defendant to have committed larceny, Hamood must have held a right to possess the property to the exclusion of defendant. But Hamood did not hold such a right. As the foreclosure-sale purchaser, he held equitable title to the property during the redemption period, which gave him no possessory rights. *Dunitz*, 236 Mich at 49. Defendant, by contrast, held legal title and, critically for our purposes, the sole right to possess the property. *Kubczak*, 456 Mich at 660-661. Therefore, defendant could not by taking the property have trespassed upon the "property of another," because no one else had the right to possess it at that time. Consequently, defendant's actions did not constitute a trespassory taking of the "property of another" and did not constitute larceny under MCL 750.360. And because the property was not stolen, defendant did not receive, possess, or conceal stolen goods. MCL 750.535(4)(a). Accordingly, we must reverse the Court of Appeals and reinstate the trial court's dismissal of the charges against defendant because he cannot be guilty of offenses under either MCL 750.360 or MCL 750.535(4)(a).[17]

V. COURT OF APPEALS

In reaching a contrary conclusion, the Court of Appeals, we believe, erred in two respects: (a) it focused on Hamood's purported right to consent rather than on his

[17] The Minnesota Supreme Court, in a case involving facts very similar to the instant case, observed in dictum that "provisions of the criminal code, such as theft . . . or criminal damage to property . . . provide no criminal recourse since during the redemption period a mortgagor has exclusive right to possession of and title to the property." *State v Zacher*, 504 NW2d 468, 472-473 (Minn, 1993).

possessory rights; and (b) its analysis of that right to consent—to the extent such analysis tracks the proper inquiry into possessory rights—was mistaken.

The Court of Appeals' threshold error was in assuming that Hamood was the "owner" of the fixtures for purposes of larceny—and thus that the fixtures constituted the "property of another" with respect to defendant—by virtue of Hamood's supposed "right to consent" to their removal, rather than by examining his specific possessory rights. This use of "consent" as the basis for ascertaining Hamood's interests for purposes of larceny is inapt because it fails to address *why* Hamood enjoyed the right, or the authority, to consent or to deny consent for a particular taking. That is, an individual is not considered to "own" property *because* he or she may consent to its taking; rather, particular interests *encompass* the right to consent. Consent is an attribute or function of some property interests, derived from a right to control the property, which in turn is an attribute or function of the right to possession of the property. Hence, "consent" is an amorphous and imprecise concept except to the extent that it serves as a proxy for the actual right to possession.

Furthermore, to the extent that the court's analysis of consent was intended to serve as a proxy for the right to possession, it is unpersuasive because neither of the sources of legal authority on which the court relied gives rise to the right to possession. The first source relied on by the Court of Appeals was MCL 600.3278. However, this statute fails to endow the purchaser with a possessory right, let alone a possessory right that permits the purchaser to dispossess the mortgagor. Rather, the statute provides the purchaser with a civil remedy if the mortgagor damages the property during the redemption period:

> During the period of redemption following a foreclosure sale of property under this chapter, the mortgagor and any other person liable on the mortgage is liable to the purchaser at the sale, or the mortgagee, payee, or other holder of the obligation secured by the mortgage if the mortgagee, payee, or other holder takes or has taken title to the property at the sale either directly or indirectly, for any physical injury to the property beyond wear and tear resulting from the normal use of the property if the physical injury is caused by or at the direction of the mortgagor or other person liable on the mortgage. [MCL 600.3278(1).]

Nowhere does this statute purport to create a right to possession. Indeed, the statute itself indicates to the contrary, providing that "[a]n action for damages under this section may be joined with an action for possession of the premises under [MCL 600.5701 *et seq*.]." MCL 600.3278(5). The "action for possession" refers to summary proceedings for obtaining judgments of possession and includes situations in which the person in possession "causes extensive and continuing physical injury to the premises[.]" MCL 600.5714(1)(d). This action thus *complements* an action for possession, but does not *give rise* to a right to possession. Nor indeed does the statute purport even to prohibit damage to, or removal of property from, the premises. Rather, it purports only to provide a civil remedy or recourse to a purchaser *when* such damage occurs. The statute does not grant possessory rights in the property as a predicate for larceny.

The second source relied on by the Court of Appeals was the equitable title held by Hamood as a result of the foreclosure sale. This also does not suffice to grant him the possessory rights necessary to establish larceny. As discussed earlier, the Court of Appeals did not analyze in any depth the limited nature of the equitable title derived from the sale, which clearly

cabins the scope of the title and authority belonging to the foreclosure purchaser during the redemption period.

The prosecutor now offers an additional reason why the court below reached the correct result based on Hamood's equitable title. Relying on the relation-back doctrine, the prosecutor claims that because this title related back to the foreclosure-sale date, defendant "at the very least" trespassed on Hamood's constructive possession, if not also on his actual possession, "since the redemption option was never [in the end] exercised." In support of this proposition, the prosecutor cites *Wells Fargo Bank*, 304 Mich App at 590-594, in which a foreclosure-sale purchaser was held liable for condominium fees and assessments accruing from the purchase date.

But *Wells Fargo* in particular, and the relation-back doctrine in general, are inapposite. Regarding *Wells Fargo*, that decision turned on the Condominium Act, MCL 559.101 *et seq*., which specifically provided that the foreclosure-sale purchaser was not liable for condominium assessments " *'that became due prior to the acquisition of title to the [property] by that* . . . purchaser.' " *Wells Fargo*, 304 Mich App at 590-591, quoting MCL 559.158. The Court thus held that the purchaser was responsible for dues accruing after he acquired title. This occurred when the purchaser took the equitable title, as the Act did not require the acquisition of "absolute title." *Id*. at 592-593. Although the Court noted that the relation-back doctrine also supported its analysis, it expressly stated, "Our analysis of the [Act] is not reliant upon the relation-back doctrine." *Id*. at 593.

Moreover, the doctrine cannot reasonably afford a basis for finding larceny here because it is premised

on retroactivity; the doctrine does not afford the purchaser any possessory rights *during* the redemption period. Larceny, by contrast, is concerned with the redemption period itself as it actually elapses: the taking cannot be merely "retroactively criminal," but must be criminal at the time it occurs. See *Anderson*, 7 Mich App at 517, citing *People v Bradovich*, 305 Mich 329, 332; 9 NW2d 650 (1943); see also Saltzman, pp 543-544 ("Ordinarily the taking . . . must coincide with the intent to steal. Thus, if the taking was lawful, a later conversion with the intent to steal might be larceny by conversion [MCL 750.362] or embezzlement, but it would not be larceny."). It follows that only the circumstances at the time of the taking are relevant for assessing criminal liability, not those arising afterwards.

Further, this Court has held that the relation-back doctrine is "remedial, and its use in the law is to prevent wrongs and punish trespasses. . . . As has been repeatedly declared in this court, it can never be so applied as to make that a wrong which was innocent when done . . . ." *Flint & PM R Co v Gordon*, 41 Mich 420, 431; 2 NW 648 (1879). Thus, it cannot be used as proposed here because to do so would render the mortgagor's actions "wrong" only on the basis of subsequent circumstances, imposing criminal liability on actions that when they took place were not criminal.[18]

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[18] The prosecutor also argues that defendant's right to possess the property during the redemption period does not entail a right to remove or dispose of fixtures attached to the property. Citing *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57; 602 NW2d 215 (1999), the prosecutor contends that "property" rights are represented by a " 'bundle of sticks' " including rights of possession, enjoyment, and disposition. The right to possess is thus distinct from the right to remove or dispose, and defendant's rights did not include the latter. This fails to persuade for two reasons. First, the prosecutor presents no support for the proposition that the mortgagor who retains legal title

Thus, even with the prosecutor's elaborations, the Court of Appeals erred because there is no support for holding that the foreclosure sale purchaser's equitable title combined with MCL 600.3278(1) to confer upon the purchaser a possessory interest in the property as against that of the mortgagor. The Court simply failed to explain how the coexistence of Hamood's equitable interest, one that is non-possessory, with a statutory remedy provision that is also non-possessory, results in a possessory right to the fixtures at the time of the taking.

VI. CONCLUSION

The outcome in this case is mandated by MCL 750.360's adoption of the common law of larceny, which protects possessory rights. At the time defendant removed the fixtures, only he held possessory rights in these, and the complainant held no such rights. Accordingly, defendant could not have committed larceny by removing the fixtures. Absent a proper larceny charge, the fixtures were necessarily not "stolen" goods. Therefore, the charge of receiving or possessing stolen goods must fail as well. For these reasons, we reverse the Court of Appeals judgment

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and the right to possess has somehow lost the right to remove or dispose. Second, even if defendant lacked such rights, removal or disposal would still not constitute larceny because it would not constitute a trespass upon Hamood's interest. It does not follow from defendant's supposed lack of right to remove or dispose that Hamood has somehow obtained possessory rights on which defendant has trespassed. We also reject the prosecutor's argument that "defendant trespassed on Hamood's future interest in the fixtures by removing them from the house." Larceny protects present possessory rights, and the relevant inquiry is therefore not which possessory rights, Hamood might come to enjoy in the future, but which possessory rights, if any, he held at the time of the alleged taking.

and reinstate the trial court's dismissal of the criminal charges against defendant.[19]

YOUNG, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MARKMAN, J.

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[19] Our resolution of this case makes it unnecessary to address the second issue on which oral argument was heard: "whether fixtures taken from real property may be the subject of larceny under MCL 750.356(1)." *March*, 497 Mich at 1041.

PEOPLE v FEELEY

Docket No. 152534. Argued on application for leave to appeal May 4, 2016. Decided June 29, 2016.

Ryan S. Feeley was charged with resisting and obstructing after he ran from a reserve police officer and then failed to comply with the reserve police officer's order to stop. The 53rd District Court, Carol S. Reader, J., refused to bind defendant over for trial on the charge of resisting and obstructing because the court concluded that the reserve police officer's stop of defendant was unlawful. The incident giving rise to this case occurred at a bar after the police were called to assist with an intoxicated person there. The reserve police officer and a full-time police officer responded. According to the reserve police officer, the reserve police officer asked to speak with defendant, who was identified on the scene by defendant's wife as the troublemaker, and defendant turned and ran away. The reserve police officer testified that he gave chase, identified himself as a police officer, and ordered defendant to stop. The reserve police officer added that defendant stopped after the reserve police officer's second command, looked at the reserve police officer, swore, and began reaching behind his back. The reserve police officer testified that he pulled his weapon and ordered defendant to the ground at that point. Defendant complied and was taken into custody. The prosecution filed in the circuit court an application for leave to appeal the district court's decision not to bind defendant over for trial. The Livingston Circuit Court, Michael P. Hatty, J., denied the application for lack of merit. The prosecution appealed by leave granted in the Court of Appeals. The Court, SHAPIRO and M. J. KELLY, JJ. (SAWYER, P.J., dissenting), affirmed. 312 Mich App 320 (2015). SHAPIRO and M. J. KELLY, JJ., concluded that reserve police officers were not among the persons described in MCL 750.81d. SAWYER, P.J., dissented, stating that reserve police officers were within the scope of persons contemplated by MCL 750.81d. The prosecution filed an application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 498 Mich 969 (2016).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court *held*:

The Court of Appeals incorrectly concluded that a reserve police officer is not among the persons contemplated in MCL 750.81d—the statute prohibiting an individual from resisting or obstructing the persons specified in the statute. Police officer is expressly listed in MCL 750.81d(7)(b)(*i*) as an occupation to which the prohibition against resisting and obstructing applies, and "reserve police officers" are a subset of "police officers." "Reserve police officers" are thus "police officers" for purposes of the resisting and obstructing statute. MCL 750.81d penalizes an individual for resisting or obstructing a person described in the list in MCL 750.81d(7)(b) if the individual knows or has reason to know that the person is performing his or her duties. "Reserve police officer" is not specified on the list. According to the Court of Appeals, if the Legislature had intended to penalize a defendant's resistance to, or obstruction of, a reserve police officer's performance of his or her duties, the Legislature would have included reserve police officers in the statutory list. But the lack of a particular definition of "police officer" in MCL 750.81d and the statute's use of the phrase "including, but not limited to" meant that the Legislature intended an expansive and inclusive reading of the term "police officer." Additionally, the Legislature had adopted explicit restrictions to the definition of "police officer" in statutes addressing other matters, and it was significant that no such restriction to the definition of "police officer" was expressed in MCL 750.81d. The prosecution argued that MCL 750.81d should be read *in pari materia* with other statutes defining "police officer," but those statutes did not deal with the same subject as MCL 750.81d or share a common purpose with it. Because "reserve police officers" are a subset of "police officers" for purposes of MCL 750.81d, the judgment of the Court of Appeals had to be reversed and the case remanded to the Court of Appeals for that Court to determine whether defendant knew or had reason to know that the reserve police officer was performing his duties at the time the defendant's charged conduct, and if so, whether the reserve police officer's command to stop was lawful.

Reversed and remanded to the Court of Appeals.

CRIMES — RESISTING AND OBSTRUCTING — ORDERS ISSUED BY RESERVE POLICE OFFICERS.

A "reserve police officer" is a "police officer" for purposes of MCL 750.81d, the statute penalizing an individual for resisting or obstructing a person specified in MCL 750.81d(7), when the

> individual knows, or has reason to know, that the person is performing his or her duties; police officers are listed as persons to which MCL 750.81d applies, but "police officer" is not expressly defined in the statute and should be interpreted broadly to include reserve police officers; therefore, MCL 750.81d penalizes an individual who resists or obstructs a reserve police officer if the individual knows, or has reason to know, that the reserve police officer is performing his or her duties.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *William J. Vailliencourt, Jr.*, Prosecuting Attorney, for the people.

Fraser Trebilcock Davis & Dunlap, PC (by *Brian P. Morley* and *Aaron L. Davis*), for defendant.

BERNSTEIN, J. At issue in this case is whether the term "police officer" in MCL 750.81d(7)(b)(*i*) encompasses reserve police officers. We reverse the Court of Appeals' ruling that reserve police officers are not police officers for purposes of MCL 750.81d(7)(b)(*i*), and we remand to the Court of Appeals to address whether the district court correctly ruled that the reserve police officer in this case lacked the authority to conduct a stop of defendant.

I. FACTS AND PROCEDURAL HISTORY

In the early morning hours of May 5, 2014, a ruckus at a Brighton bar resulted in a call to the police. Two officers from the Brighton Police Department responded: Christopher Parks, a full-time police officer, and Douglas Roberts, a reserve police officer. At the time of the incident, Roberts had worked as a reserve police officer for six years. Roberts had been sworn in as a reserve police officer after a 16-week police training program. He was assigned a uniform, a patrol car, and a gun. Roberts worked full 12-hour shifts along-

side a full-time police officer about two or three times a month, filling in for officers on sick leave or vacation. He was not certified by the Michigan Commission on Law Enforcement Standards (MCOLES), which is required of full-time police officers under the MCOLES Act, MCL 28.601 *et seq*.

At the preliminary examination, Roberts testified that he and Parks arrived at the bar in a fully marked police vehicle. Roberts was dressed in a uniform, which Roberts described as "[b]lue pants, blue police shirt marked on the sleeves, and a[n] outside carrier vest that has [a] badge, name tag and any insignias on it." Roberts also testified that he was carrying a weapon. Roberts recalled that as the two officers approached a small crowd outside the bar, a woman informed Roberts that the troublemaker was her intoxicated husband, defendant Ryan Scott Feeley. Roberts further testified that he approached defendant and asked him to stand aside, at which point defendant ran away from Roberts. Roberts chased defendant, yelling "police officer, stop." Roberts added that he repeated his command after running about a block, and defendant slowed down. According to Roberts, defendant "turned and squared off," swore at Roberts, and "took his right arm and reached behind his back." Roberts testified that in fear for his safety, he drew his gun and ordered defendant to the ground.

Defendant was arrested and charged with resisting and obstructing a police officer under MCL 750.81d. Defendant objected to the prosecution's request for a bindover, arguing that (1) Roberts did not have an articulable suspicion for stopping defendant in the first place, and (2) defendant could not be held criminally liable for resisting and obstructing under MCL 750.81d

because Roberts, being a reserve police officer, was not a "police officer" within the meaning of that statute.

On August 29, 2014, the district court issued an opinion and order denying the prosecution's request for a bindover. *People v Feeley*, opinion and order of the Livingston County Trial Court-District Court Division, issued August 29, 2014 (Case No. 14-1183 FY). The district court determined that "Roberts was not a police officer as provided by statutory language, legislative intent, training requirements, proper oath administration, and written instrument requirements." *Id*. at 5. The district court also concluded sua sponte that the stop of defendant was unlawful and invalid because Roberts "lacked the authority to make a stop of a person." *Id*. at 8.[1] The prosecution appealed in the circuit court. On January 13, 2015, the circuit court denied the prosecution's application for leave to appeal for lack of merit in the grounds presented.

The prosecution appealed in the Court of Appeals. On September 15, 2015, the Court of Appeals affirmed the district court in a split, published opinion. *People v Feeley*, 312 Mich App 320; 876 NW2d 847 (2015). In affirming the district court's denial of the prosecution's bindover request, the Court of Appeals majority concluded that a reserve police officer did not fall within the scope of a "police officer" as used in MCL 750.81d(7)(b)(*i*). Pointing to the Legislature's explicit

[1] Treating Roberts as a "special deputy" under MCL 51.70, which requires an instrument in writing signed by the Sheriff, the district court found that the lack of such a written instrument precluded Roberts from making a stop of an individual. *Id*. We find this analysis puzzling as Roberts is a member of the Brighton Police Department rather than the Livingston County Sheriff Department. However, we recognize that there may be other grounds on which to reach the conclusion that Roberts lacked the authority to conduct a stop of defendant.

mention of other types of law enforcement personnel, the majority assigned great significance to the omission of the term "reserve police officer" from the statute's enumerated list. To the contrary, the dissent found no significance in the omission of the term "reserve police officer" from MCL 750.81d(7)(b) and would have concluded that Roberts was a police officer of a political subdivision of this state, namely the City of Brighton. The Court of Appeals did not address the district court's ruling that Roberts lacked the authority to stop defendant.

The prosecution appealed, arguing that the term "police officer" in MCL 750.81d(7)(b)(*i*) encompasses reserve police officers. This Court ordered oral argument on whether to grant the application or take other action. We directed the parties to address whether the term "police officer" in MCL 750.81d(7)(b)(*i*) encompasses reserve police officers. *People v Feeley*, 498 Mich 969 (2016).

II. STANDARD OF REVIEW

A district court's decision regarding a bindover is reviewed for an abuse of discretion, and "[a court] necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). Statutory construction is a question of law that is reviewed de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

III. ANALYSIS AND APPLICATION

In reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). We begin by examining the plain

language of the statute. *Id*. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Id*. "The law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 168; 680 NW2d 840 (2004).

The resisting and obstructing statute, MCL 750.81d, provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a *person who the individual knows or has reason to know is performing his or her duties* is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> * * *
>
> (7) As used in this section:
>
> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.
>
> (b) "Person" means any of the following:
>
> (*i*) *A* police officer of this state or of a political subdivision *of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.*
>
> (*ii*) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(*iii*) A conservation officer of the department of natural resources or the department of environmental quality.

(*iv*) A conservation officer of the United States department of the interior.

(*v*) A sheriff or deputy sheriff.

(*vi*) A constable.

(*vii*) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.

(*viii*) A firefighter.

(*ix*) Any emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, MCL 333.20950.

(*x*) An individual engaged in a search and rescue operation as that term is defined in section 50c. [Emphasis added.]

Put simply, an individual is guilty of resisting or obstructing if he "resists [or] obstructs . . . a person who the individual knows or has reason to know is performing his or her duties . . . ." MCL 750.81d(1). To "obstruct" includes "a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).[2] A "person" in this context includes "[a] police officer of this state or of a political subdivision of this state . . . ." MCL 750.81d(7)(b)(*i*).

Defendant claims that a reserve police officer is not a "police officer" under MCL 750.81d(7)(b)(*i*). We disagree. The plain language of the statute does not explicitly distinguish reserve police officers from police officers, nor does the statute provide any indication that the two should be treated differently. Rather, we

[2] "Obstruct" is the only verb defined in MCL 750.81d(7). None of the other verbs used in MCL 750.81d(1) to describe punishable conduct are defined in MCL 750.81d.

find that, for purposes of MCL 750.81d(7)(b)(*i*), reserve police officers are a subset of police officers.

First, we note that the statute does not define the term "police officer." "All words and phrases shall be construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. "If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015), citing *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). The dictionary definition of the term "police officer" supports the interpretation that reserve police officers are police officers under MCL 750.81d(7)(b)(*i*). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "police officer" as "a member of a police force," and the term "police force" as "a body of trained officers entrusted by a government with maintenance of public peace and order, enforcement of laws, and prevention and detection of crime." This suggests that a police officer is a member who is (1) trained and (2) entrusted by a government to (3) maintain public peace and order, enforce laws, and prevent and detect crime. Roberts was trained in a 16-week police training program. After completing the training program, Roberts was sworn in as a reserve police officer.[3] As part of his oath, he pledged to serve the people of the City of Brighton and to uphold the United States Constitution and the laws of the state and the city. After being sworn in, the Brighton Police Department allowed Roberts to wear a

[3] Roberts testified that the procedure of being sworn in to serve as a reserve police officer in Brighton was similar to the way he was previously sworn in to serve in the Hamburg Township Police Department.

police uniform, along with a badge and insignias, and to carry a weapon. The City of Brighton entrusted Roberts to work alongside a full-time officer for the common goals of maintaining peace and order, enforcing laws, and preventing and detecting crime. Thus, he is properly considered a police officer under the common meaning of the term.[4]

In addition, the Legislature's use of the phrase "including, but not limited to" in MCL 750.81d(7)(b)(*i*) indicates that it intended an expansive and inclusive reading of the term "police officer." We have held that this particular phrase is not "one of limitation," but is instead meant to be illustrative and "purposefully capable of enlargement." *In re Forfeiture of $5,264*, 432 Mich 242, 255; 439 NW2d 246 (1989), citing *Skillman v Abruzzo*, 352 Mich 29, 33-34; 88 NW2d 420 (1958). Accordingly, by using this phrase, the Legislature expressly indicated its intention not to limit a definition to listed examples. This interpretation undermines the Court of Appeals' reliance on the doctrine of *expressio unius est exclusio alterius*, which provides that "the express mention in a statute of one thing implies the exclusion of other similar things." *People v Jahner*, 433 Mich 490, 500 n 3; 446 NW2d 151 (1989). While MCL 750.81d(7)(b) does not expressly mention reserve police officers in its enumerated list of "[p]er-

[4] We do not find it necessary to turn to *People v McRae*, 469 Mich 704; 678 NW2d 425 (2004), or *Bitterman v Village of Oakley*, 309 Mich App 53; 868 NW2d 642 (2015), which were addressed by the Court of Appeals, for our interpretation of the term "police officer" under MCL 750.81d(7)(b)(*i*) as including reserve police officers. Those cases addressed the status of reserve police officers in contexts different from the one at issue. *McRae* considered a reserve officer's status as a "state actor" for purposes of a defendant's Sixth Amendment right to counsel, *McRae*, 469 Mich at 718, and *Bitterman* considered the status of reserve police officers for purposes of a Freedom of Information Act exemption, *Bitterman*, 309 Mich App at 70.

son[s]," the plainly stated breadth of the definition of "police officer" in MCL 750.81d(7)(b)(*i*) eliminates any need to do so or any implication that this omission should be read as an intended exclusion.

Defendant's argument that reserve police officers should be treated differently than regular police officers because of certain factual distinctions also falls short. We acknowledge that Roberts, a reserve officer, differs from regular full-time officers in the following respects: (1) he is not a full-time employee, (2) he is required to be accompanied by a full-time officer, and (3) he is not certified under MCOLES. However, these distinctions are not recognized by the plain language of the statute and do not form a sufficient basis to exclude reserve police officers like Roberts from the scope of the term "police officer" in MCL 750.81d. We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. See *Sun Valley*, 460 Mich at 236. "It is not within the province of this Court to read therein a mandate that the [L]egislature has not seen fit to incorporate." *Jones v Grand Ledge Pub Sch*, 349 Mich 1, 11; 84 NW2d 327 (1957). MCL 750.81d(7)(b)(*i*) does not define a police officer by referring to a particular work arrangement or level of certification. No reference is made in the statute regarding whether a police officer must work full-time, must be capable of working individually, or must be MCOLES-certified. As previously noted, the statute does not define the term "police officer" at all, and the commonly understood meaning of the term contains no such requirements. Because the plain language of the statute is unambiguous, we decline to read these requirements into it.

The Legislature has demonstrated its ability to adopt explicit restrictions to the definition of a "police

officer" when such restrictions are intended. For example, the MCOLES Act itself limits its definition of "police officer" to "[a] *regularly employed* member of a law enforcement agency authorized and established by law, including common law, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state." MCL 28.602(*l*)(*i*) (emphasis added). This language indicates that the Legislature is capable of limiting the definition of a police officer based on employment status when such a limitation is intended; the Legislature chose, however, to impose no such restriction in MCL 750.81d(7)(b).

The requirement that a reserve police officer must be accompanied by a full-time officer might be taken to imply that a reserve police officer's independent authority to give a lawful command is limited absent the authority provided by the accompaniment of a full-time officer. However, even if such a limitation exists, it does not exclude reserve officers from being considered police officers within the meaning of the statute. MCL 750.81d(7)(b)(*i*) is silent with regard to the nature of a police officer's authority or the restrictions imposed on an officer's performance of his or her duties. Thus, there is no basis to read into MCL 750.81d a requirement that independent authority to give a lawful command to stop must exist as a prerequisite to being considered a police officer. Moreover, the explicit inclusion of motor carrier officers and capitol security officers in MCL 750.81d(7)(b)(*i*) suggests that individuals with limited authority may still be considered police officers. Motor carrier officers have only the authority to "enforc[e] the general laws of this state as they pertain to commercial vehicles." MCL 28.6d(1). The authority of capitol security officers is limited to "the protection of state owned or leased, property or facili-

ties, in the city of Lansing, and in Windsor township of Eaton county." MCL 28.6c(1). As MCL 750.81d(7)(b)(*i*) makes clear, however, these officers nonetheless constitute "police officer[s]" for purposes of the resisting and obstructing statute, despite the limitations on the scope of their authority. We see no reason why any purported limitation on Roberts's authority should lead to a different result. Whether a full-time officer was present when Roberts commanded that defendant stop simply does not speak to whether Roberts was a "police officer" in the first place.

It is similarly clear that the Legislature did not intend to limit the term "police officer" in MCL 750.81d(7)(b)(*i*) to those officers required to possess MCOLES certification. Again, the Legislature has repeatedly shown that it knows how to impose such a requirement when it is intended. For instance, MCL 28.421(1)(h) defines "peace officer" as

> an individual who is employed as a law enforcement officer, *as that term is defined under section 2 of the commission on law enforcement standards act, . . . MCL 28.602*, by this state or another state, a political subdivision of this state or another state, or the United States, and who is required to carry a firearm in the course of his or her duties as a law enforcement officer. [Emphasis added.]

Similarly, the definition of "law enforcement official" in MCL 763.7(c)(*i*) includes "[a] police officer of this state or a political subdivision of this state as defined in section 2 of the commission on law enforcement standards act, . . . MCL 28.602." MCL 750.81d(7)(b), however, contains no such language or reference to the MCOLES Act. To the contrary, the only officers expressly identified as "police officer[s]" under MCL 750.81d(7)(b)(*i*)—motor carrier officers and capitol se-

curity officers—are not required to be certified under the MCOLES Act. Thus, there is no basis to conclude that the Legislature intended to incorporate the MCOLES Act's definitions or requirements into the resisting and obstructing statute.

The Legislature's reference in MCL 750.81d(7)(b) to definitions from other statutes further supports this conclusion. MCL 750.81d(7)(b)(*ix*) refers to "[a]ny emergency medical service personnel described in . . . MCL 333.20950," and MCL 750.81d(7)(b)(*x*) refers to "[a]n individual engaged in a search and rescue operation as that term is defined in [MCL 750.50c]." Defendant urges us to likewise define "police officer" under MCL 750.81d(7)(b)(*i*) according to the terms of the MCOLES Act, which expressly exclude "a member of . . . a police auxiliary temporarily performing his or her duty under the direction of the sheriff or police department[.]" See MCL 28.609(1). Had the Legislature intended to incorporate this definition, it could have done so simply by referring to the MCOLES Act in the text of MCL 750.81d(7)(b)(*i*). It did not.

Therefore, the plain language of MCL 750.81d(7)(b)(*i*) dictates that, whatever distinctions may exist between a full-time police officer and a reserve police officer such as Roberts, both are considered "[a] police officer" as that term is used in MCL 750.81d(7)(b)(*i*). This interpretation is consistent with the legislative purpose behind the enactment of MCL 750.81d: "to protect persons in all professions connected to law enforcement instead of only peace officers." *People v Moreno*, 491 Mich 38, 53 n 39; 814 NW2d 624 (2012). That a wide variety of professions is represented on the list serves to reflect this goal. See MCL 750.81d(7)(b)(*i*)-(*x*) (providing that protected persons include state and local police officers, college

police officers, conservation officers, sheriffs or deputy sheriffs, constables, secret service agents, Department of Justice agents, firefighters, emergency medical service personnel, and individuals engaged in search and rescue operations). Acknowledging that reserve police officers belong in this group of protected professionals is consistent with the aforementioned legislative purpose.

Defendant further asserts that the resisting and obstructing statute and the MCOLES Act should be read *in pari materia*. Defendant argues that in applying this doctrine, the narrower definition of police officer used in the MCOLES Act should be employed when parsing MCL 750.81d(7)(b)(*i*) to conclude that the term "police officer" does not include reserve police officers. We do not find this argument convincing.

As we explained in *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015):

> Under the doctrine [of *in pari materia*], statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law. An act that incidentally refers to the same subject is not *in pari materia* if its scope and aim are distinct and unconnected. [Citation omitted.]

In this case, the resisting and obstructing statute and the MCOLES Act do not deal with the "same subject or share a common purpose." *Id*. The resisting and obstructing statute is designed to "protect officers from physical harm." *People v Vasquez*, 465 Mich 83, 92; 631 NW2d 711 (2001) (opinion by MARKMAN, J.). Even more broadly, the Penal Code, which encompasses the resisting and obstructing statute, purports "to . . . define crimes and prescribe the penalties and remedies . . . ." MCL 750.1. In contrast, the MCOLES Act is:

> An Act to provide for the creation of the commission on law enforcement standards; to prescribe its membership, powers, and duties; to prescribe the reporting responsibilities of certain state and local agencies; to provide for additional costs in criminal cases; to provide for the establishment of the law enforcement officers training fund; and to provide for disbursement of allocations from the law enforcement officers training fund to local agencies of government participating in a police training program. [MCL 28.601.]

These differences advise against reading the statutes *in pari materia*.

The MCOLES Act itself also suggests that its definitions cannot be exported to other contexts, because the definitions in MCL 28.602 are introduced with the phrase, "[a]s used in this act[.]" MCL 28.602. When statutes do not deal with the same subject or share a common purpose and the Legislature has chosen to specifically limit the applicability of a statutory definition, the doctrine of *in pari materia* is inapplicable. See *Mazur*, 497 Mich at 314-315.

IV. CONCLUSION

We conclude that the Court of Appeals erred by finding that the term "police officer" in MCL 750.81d(7)(b)(*i*) does not encompass reserve police officers. Therefore, we reverse the Court of Appeals' holding regarding the scope of the term "police officer." Because the Court of Appeals did not address whether the district court correctly concluded that Roberts lacked the authority to conduct a stop of defendant, we remand this case to the Court of Appeals to address that issue, including whether defendant knew or had reason to know that Roberts was performing his duties

at the time of defendant's charged conduct,[5] and, if so, whether Roberts's command to stop was lawful.[6] We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

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[5] "[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual *knows or has reason to know is performing his or her duties* is guilty of a felony . . . ." MCL 750.81d(1) (emphasis added).

[6] " 'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply *with a lawful command*." MCL 750.81d(7)(a) (emphasis added).

PEOPLE v HALL

Docket No. 150677. Argued on application for leave to appeal January 13, 2016. Decided June 29, 2016.

Brandon M. Hall was charged in the 58th District Court with 10 felony counts of forgery under MCL 168.937 after stipulating that he filled in false names, addresses, and signatures on petitions to nominate a prospective judicial candidate. The prosecution moved to bind the case over to the Ottawa Circuit Court for trial. Defendant objected, arguing that the facts supported only misdemeanor charges under MCL 168.544c. The district court, Bradley S. Knoll, C.J., denied the motion for bindover on the felony charges but ruled that there was probable cause to proceed to trial on 10 misdemeanor counts under MCL 168.544c(8), which prohibits an individual from signing a petition with a name other than his or her own. On appeal by the prosecution, the circuit court, Jon A. Van Allsburg, J., affirmed, ruling that MCL 168.544c and MCL 168.937 conflicted and that MCL 168.544c was controlling because MCL 168.544c was the more recent and specific statute governing defendant's conduct. The Court of Appeals, BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ., affirmed in an unpublished opinion per curiam issued October 23, 2014 (Docket No. 321045), and the prosecution sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 497 Mich 1023 (2015).

In a unanimous opinion by Chief Justice YOUNG, the Supreme Court *held*:

The lower courts erred by concluding that MCL 168.544c and MCL 168.937 conflict. When construed as a substantive offense, MCL 168.937 prohibits forgery, or the making of a false document under the Michigan Election Law with the intent to defraud, and punishes forgery as a felony. MCL 168.544c, a misdemeanor offense, proscribes the specific act of signing another's name to a nominating petition and does not require proof of a specific intent to defraud. If proved, the facts as alleged in this case establish that defendant violated both statutes. Prosecuting defendant for

felonies committed in violation of MCL 168.937 was barred neither by tie-breaking canons of statutory interpretation nor principles of due process.

1. The prosecution did not abuse its discretion by charging defendant with the felony offense of forgery under MCL 168.937 rather than the misdemeanor offense of falsifying nominating petitions under MCL 168.544c. Prosecutors have broad discretion in deciding under which statute they will prosecute a defendant, even if more than one statute is applicable. Both MCL 168.937 and MCL 168.544c can be given full effect without a conflict. Given the Court of Appeals' unchallenged holding that MCL 168.937 is a substantive offense, MCL 168.937 incorporates the common-law definition of forgery and therefore requires proof of specific intent to defraud. MCL 168.544c(8) does not require proof of specific intent. These distinct statutes are not ambiguous, and the lower courts accordingly erred by applying tie-breaking canons of statutory interpretation, including the presumption that the more recent and more specific of two seemingly conflicting statutes read *in pari materia* is controlling, as well as the rule of lenity. The codification of additional regulations and sanctions in MCL 168.544c, absent language suggesting the two statutes may not apply concurrently, demonstrated a legislative intent to complement rather than supplant MCL 168.937. MCL 168.937 explicitly contemplates that the Legislature might specify different or additional punishment by providing for felony punishment "unless herein otherwise provided." The inclusion of the phrase "unless herein otherwise provided" in MCL 168.937 did not require the conclusion that MCL 168.544c was an exception to felony punishment for election law forgery. MCL 168.544c provides that the crime of signing another's name to a nominating petition will be punished as a misdemeanor absent proof of specific intent to defraud; it does not provide that it applies to the exclusion of other provisions of the Michigan Election Law.

2. Defendant's prosecution under MCL 168.937 did not violate fundamental elements of fairness because the plain text of that statute informed him he could be subject to felony charges if he committed election law forgery. Both MCL 168.937 and MCL 168.544c are fully enforceable on their own terms. Each unambiguously specifies the conduct prohibited and the punishment that flows from that conduct. Although the warning language on the nominating petitions conveyed to defendant that he would be guilty of a misdemeanor if he knowingly made a false statement in the circulator's certificate, a second warning stated that someone who signs a name other than his or her own is violating

the provisions of the Michigan election law, and that warning did not state that the crime was a misdemeanor.

Court of Appeals judgment reversed; case remanded to the district court for further proceedings.

1. STATUTES — ELECTIONS — NOMINATING PETITIONS — FORGERY — INTENT TO DEFRAUD.

MCL 168.937, which defines a general election law forgery offense, and MCL 168.544c(8), which specifically proscribes the falsification of nominating petitions, do not conflict; when construed as a substantive offense, MCL 168.937 requires proof of specific intent to defraud, and MCL 168.544c(8) does not.

2. CONSTITUTIONAL LAW — DUE PROCESS — NOTICE — ELECTIONS — NOMINATING PETITIONS — FORGERY — CHARGING DECISIONS.

A prosecutor's decision to charge a defendant with the felony of election law forgery under MCL 168.937 rather than the misdemeanor of falsifying nominating petitions under MCL 168.544c(8) for conduct that is punishable under either statute does not violate fundamental elements of fairness (US Const, Am XIV; Const 1963, art 1, § 17).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Richard L. Cunningham*, Assistant Attorney General, for the people.

Hann Persinger, PC (by *Donald H. Hann*), for defendant.

Amicus Curiae:

Timothy M. Holloway for Edward Pinkney.

YOUNG, C.J. Defendant is charged with violating the Michigan Election Law[1] by forging nominating petitions in a 2012 judicial election. At issue is whether defendant may be bound over to circuit court on felony charges for committing forgery under MCL 168.937, or whether the prosecution was limited to proceeding

[1] MCL 168.1 *et seq*.

with misdemeanor charges under MCL 168.544c(8)(a) for signing the petitions "with a name other than his . . . own." The lower courts believed that the statutes conflicted, creating an ambiguity, and therefore held that defendant could be charged only with the lesser misdemeanor offense.[2] We conclude that there is no conflict between MCL 168.544c and MCL 168.937. Instead, the Legislature has provided differing punishments for two distinct offenses, and each applies independently to prohibit defendant's conduct. Accordingly, we reverse the decision of the Court of Appeals and remand this case to the 58th District Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant Brandon Hall was hired by a prospective judicial candidate to gather nominating signatures of qualified voters in the 2012 election for the 58th District Court. By the evening before the May 1, 2012 deadline to file the nominating petitions, defendant had not gathered the 1,000 signatures necessary to nominate the candidate. That night, defendant filled in blank nominating petitions with false names and addresses and then signed the petitions with those false names. He attempted to disguise his handwriting by using different colored pens and writing with his right and left hands. Defendant was aware that false elector names and signatures appeared on the petitions but nonetheless signed each as the circulator, certifying

[2] The Court of Appeals held that this statute creates a substantive offense. See *People v Hall*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2014 (Docket No. 321045), p 6. Although the defendant argued in the Court of Appeals that MCL 168.937 does not create a substantive offense, he did not appeal this holding or otherwise pursue this argument, and the parties did not otherwise ask us to review it. We therefore decline to reach this question.

that each petition had been properly circulated and actually signed by qualified voters. Defendant continued to sign false nominator signatures the next day while the candidate drove defendant to Lansing. The petitions were filed with the Bureau of Elections on May 1.

The state of Michigan charged defendant with 10 counts of forgery under MCL 168.937, bringing a separate felony count for each of the 10 forged nominating petitions. Defendant was arraigned on these charges. The prosecutor moved to bind the case over to the Ottawa Circuit Court for trial, and defendant objected. Defendant argued that the stipulated facts accepted by the district court supported only misdemeanor charges under MCL 168.544c. After a hearing on the motion, the district court denied the motion to bind defendant over for trial on the felony charges. The district court concluded that MCL 168.937 only imposed felony liability for prohibited conduct expressly identified as "forgery" elsewhere in the Michigan Election Law. The district court also reasoned that the rule of lenity should apply to mitigate punishment. The district court further held that there was sufficient probable cause to proceed to trial on 10 misdemeanor counts under MCL 168.544c(8),[3] which states that "an individual shall not . . . sign a petition with a name other than his or her own."

The prosecution appealed, and the Ottawa Circuit Court affirmed the district court decision. The circuit court concluded that MCL 168.544c was a more recent and specific statute governing defendant's conduct

[3] At the time the lower courts decided this case, this provision, though identical, was located in a different subsection. Subsequent renumbering did not change the content of the provision. See MCL 168.544c, as amended by 2014 PA 94 and 2014 PA 418.

and therefore must control over the general forgery offense of MCL 168.937. The judge highlighted the language in the nominating petitions that specifically warned defendant that "a circulator knowingly making a false statement in the above certificate . . . is guilty of a misdemeanor."[4] The court cited the rule of lenity and due process considerations as alternative bases for its decision.

The prosecution appealed to the Court of Appeals, which affirmed the district court's refusal to bind over on the felony forgery charges.[5] The Court of Appeals first held that MCL 168.937 created a substantive offense of forgery and was not merely a penalty provision.[6] It then concluded that MCL 168.937 conflicted with MCL 168.544c. Based on the presumption that more recent and specific statutes control over more general statutes, as well as the rule of lenity, the panel held that defendant could only be bound over on misdemeanor offenses under MCL 168.544c. The Court of Appeals held in the alternative that charging defendant with felonies rather than misdemeanors violated defendant's due process rights. The prosecution appealed the Court of Appeals' decision, and this Court ordered oral argument on the application for leave to appeal.[7]

II. STANDARD OF REVIEW

A district court's decision to bind over a defendant is generally reviewed for an abuse of discretion.[8] To the

[4] MCL 168.544c.

[5] *Hall*, unpub op at 10.

[6] The parties do not dispute this issue on appeal in this Court.

[7] *People v Hall*, 497 Mich 1023 (2015).

[8] *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

extent the lower court's ruling is based on questions of law, however, it is reviewed de novo.[9] Questions of constitutional and statutory interpretation present questions of law reviewed de novo.[10]

III. ANALYSIS

A. MICHIGAN ELECTION LAW

The Michigan Election Law details the requirements for a valid nominating petition at MCL 168.544c. MCL 168.544c prescribes the form of the nominating petition, defines a valid nominating signature, and describes how the petition must be circulated. This section also establishes various punishments for individuals who violate its requirements. Subsection (8) sets forth the primary prohibitions:

> An individual shall not do any of the following:
>
> (a) Sign a petition with a name other than his or her own.
>
> (b) Make a false statement in a certificate on a petition.
>
> (c) If not a circulator, sign a petition as a circulator.
>
> (d) Sign a name as circulator other than his or her own.

Defendant argues that, as an individual who signed a nominating petition with a name other than his own, he may be subject to punishment only under MCL 168.544c(9):

> An individual who violates [MCL 168.544c(8)] is guilty of a misdemeanor punishable by a fine of not more than $500.00 or imprisonment for not more than 93 days, or both.

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[9] *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

[10] *UAW v Green*, 498 Mich 282, 286; 870 NW2d 867 (2015).

The prosecution, however, charged defendant under MCL 168.937:

> Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.937 is located in a chapter titled "Offenses and Penalties," which defines a number of additional criminal offenses, both misdemeanors and felonies. The offenses in this chapter supplement the prohibitions defined elsewhere in the Michigan Election Law.[11] There are also provisions that define the punishment for persons found guilty of misdemeanors[12] and felonies[13] under the Michigan Election Law.

Defendant agrees on appeal that the substance of his misconduct, intentionally signing false nominating signatures and intentionally making false circulator certifications, is prohibited under both MCL 168.544c and MCL 168.937. He argues, however, on statutory and constitutional grounds, that he is chargeable only with the lesser misdemeanor offense specified in MCL 168.544c.

B. STATUTORY CONFLICT

Prosecutors have broad discretion in deciding under which statute they will prosecute a defendant, even if more than one statute is applicable.[14] Statutory interpretation begins with the text of the statutes, and

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[11] See, e.g., MCL 168.931; MCL 168.932.

[12] MCL 168.934.

[13] MCL 168.935.

[14] See *People v Ford*, 417 Mich 66, 84; 331 NW2d 878 (1982).

"effect must be given to every clause and sentence."[15] The Court "must avoid an interpretation that would render any part of the statute surplusage or nugatory."[16] "When the Legislature has unambiguously conveyed its intent in a statute, . . . judicial construction is not permitted."[17] If a statute is unambiguous, a court should not apply "preferential or 'dice-loading' " rules of statutory interpretation.[18] A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning.[19] If two provisions can instead be construed to avoid conflict, that construction should control.[20]

The Court of Appeals held that MCL 168.937 defines a general election law forgery offense, while MCL 168.544c specifically proscribes the falsification of nominating petitions. Each provision can be given full effect without leading to a conflict. In *People v Ford*, this Court held that the prosecutor properly exercised his discretion in charging the defendant "under the general uttering and publishing statute when, on the facts presented, there existed a more specific charge, misuse of a credit card."[21] In that case, the defendant forged a credit card sales slip and then presented that slip with the intent to defraud, committing misconduct prohibited under two separate statutes.[22]

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[15] *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

[16] *Koontz v Ameritech Servs*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[17] *Id*.

[18] *Id*. at 319.

[19] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

[20] *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

[21] *People v Ford*, 417 Mich 66, 75; 331 NW2d 878 (1982), citing MCL 750.249 and MCL 750.157q.

[22] *Id*. at 77.

The defendant in *Ford* argued that because the statute prohibiting misuse of a credit card was more recently enacted and more specific, the Legislature intended the credit card statute to control prosecution for his credit card crime.[23] This Court rejected that argument, concluding that the more specific statute was not the exclusive chargeable offense.[24] One significant indicator of the Legislature's intent to allow prosecution under either statute was the fact that the two offenses did not involve the same elements.[25] To charge the defendant under the general felony statute, the prosecution had to prove the additional element of forgery; this element made "the offense more culpable, thus justifying different treatment and a harsher penalty."[26] The history of amendment of both provisions and the statutory scheme revealed that the Legislature intended to complement the prior general felony offense by adopting the credit card statute and expanding the circumstances under which credit card misuses could be punished as crimes.[27]

In the present case, the Court of Appeals concluded that MCL 168.544c conflicts with MCL 168.937 because the statutes "proscribe the same conduct—i.e., the falsifying of documents (or signatures thereon) required to be submitted under the Michigan election law"—but provide distinct punishments for that conduct.[28] However, these statutes do not proscribe the same conduct. As the Court of Appeals itself noted, "MCL 168.937 makes *forgery* a felony, while

[23] *Id*. at 77-78.

[24] *Id*. at 80.

[25] *Id*.

[26] *Id*. at 81.

[27] *Id*. at 82.

[28] *Hall*, unpub op at 8.

MCL 168.544c makes signing someone else's name on a nominating petition a misdemeanor."[29] Forgery requires proof of an element not present in the offense defined in MCL 168.544c: specific intent to defraud.

MCL 168.937 states that "any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided," be subject to the specified punishments. Because defendant concedes that this statute creates the substantive offense of forgery, and forgery is not defined elsewhere in the Michigan Election Law, we turn to the common law to define "forgery" under MCL 168.937 for the purposes of this appeal. When a statute uses a general common law term to describe an offense, the statutory crime is defined as at common law.[30] "The common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud."[31] The text of MCL 168.937 evinces no intent to displace this common law definition of forgery. In contrast, MCL 168.936 similarly punishes "any person found guilty of perjury under the provisions of this act," but MCL 168.933 explicitly defines the offense of "perjury."[32] Given the Court of Appeals' holding that MCL 168.937 is a substantive offense, MCL 168.937

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[29] *Id*. (emphasis added).

[30] *People v Gillis*, 474 Mich 105, 118; 712 NW2d 419 (2006), citing *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002).

[31] *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895) (quotation marks omitted). See also *People v Susalla*, 392 Mich 387, 390; 220 NW2d 405 (1974) ("[F]orgery includes any act which fraudulently makes an instrument purport to be what it is not.") (citation and quotation marks omitted).

[32] "A person who makes a false affidavit or swears falsely while under oath under [MCL 168.848] or for the purpose of securing registration, for the purpose of voting at an election, or for the purpose of qualifying as a candidate for elective office under [MCL 168.558] is guilty of perjury." MCL 168.933.

therefore requires the prosecution to prove not only the false making of a writing described in the Michigan Election Law,[33] but also the specific intent to defraud, before a defendant may be convicted of election law forgery.

MCL 168.544c prohibits a person from signing a petition with another's name. This misconduct can be characterized as the false making of a document, the *actus reus* of forgery. MCL 168.937 and MCL 168.544c(8), however, prohibit distinct conduct and do not conflict as long as MCL 168.544c(8) does not require proof of specific intent to defraud.[34] We hold that it does not.[35] The particular offense of signing another's name to a nominating petition was not a crime at common law, let alone one that included a specific intent requirement, and so the Court must look to the text of MCL 168.544c to determine whether the statutory crime requires specific intent.[36] MCL 168.544c(8) and (9) do not specify a mental state

[33] See *People v Van Alstine*, 57 Mich 69, 73; 23 NW 594 (1885) ("At the common law [forgery] is defined to be the making of a false document with intent to defraud; and the [statutory] offense may be said to be complete when any person falsely makes *any of the writings enumerated in the statute* with intent to deceive in such a manner as to expose any person to loss or to the risk of loss.") (quotation marks omitted; emphasis added).

[34] See *Ford*, 417 Mich at 80. See also *People v LaRose*, 87 Mich App 298, 302; 274 NW2d 45 (1978) ("It is necessary to distinguish between cases where the two possible applicable statutes prohibit the same conduct and cases where the statutory crimes are distinct.").

[35] The district court found probable cause to believe defendant possessed specific intent to defraud, and defendant has not challenged this finding on appeal. The district court further ruled that the mental state required under MCL 168.544c(8) is to act knowingly. This Court does not need to decide whether MCL 168.544c(8) requires a knowing signature or a lesser mental state; it suffices to conclude that MCL 168.544c(8) requires something less than specific intent to defraud.

[36] See *People v Quinn*, 440 Mich 178, 186; 487 NW2d 194 (1992).

element. MCL 168.544c(8) states that "an individual shall not . . . sign a petition with a name other than his or her own." The statute does not use the words "forgery" or "fraud," or refer to any other common law offense. The only intent element evident from the text of MCL 168.544c(8) is the general intent to sign another's name. This is distinct from the specific intent to defraud that MCL 168.937 requires.

The lower courts agreed that MCL 168.937 requires proof of specific intent to defraud, while MCL 168.544c does not. They relied on two statutory presumptions to nonetheless conclude that the prosecution was bound to proceed under MCL 168.544c: the presumption that when two statutes read *in pari materia* conflict, the more recent and more specific statute will control,[37] and the rule of lenity.[38] These presumptions, however, do not apply unless the seemingly conflicting statutes are in fact ambiguous.[39] Given the Court of Appeals' holding that MCL 168.937 created a substantive offense, we conclude that MCL 168.937 and MCL 168.544c each

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[37] See *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) ("[S]tatutes that relate to the same subject or that share a common purpose are *in para materia* [sic] and must be read together as one. When there is a conflict between statutes that are read *in para materia* [sic], the more recent and more specific statute controls over the older and more general statute.") (citation and quotation marks omitted).

[38] See *People v Bergevin*, 406 Mich 307, 311-312; 279 NW2d 528 (1979) (" 'It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.' "), quoting *Bell v United States*, 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955).

[39] See *People v Jahner*, 433 Mich 490, 502; 446 NW2d 151 (1989) ("While the conspiracy statute and the 'lifer law' both address in general terms the punishment of criminal activity and therefore should be read in pari materia, the two statutes address separate and distinct considerations."); *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983) ("The rule of lenity properly applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent.").

define distinct prohibited conduct and the punishment that flows from that conduct. Defendant, who admittedly signed many people's names to nominating petitions[40] and made false documents with fraudulent intent,[41] could be charged under the plain terms of either MCL 168.544c or MCL 168.937. That the two statutes apply concurrently does not render them ambiguous, where each applies independently to prohibit defendant's conduct.[42] The Legislature frequently and reasonably criminalizes similar instances of misconduct in separate and independent statutes that share common elements.[43]

MCL 168.544c contains no language that suggests it is intended to be the exclusive chargeable offense for election fraud. The purpose evident from the text of MCL 168.544c is not to reduce the severity of punishment for election law forgery, but instead to criminalize conduct that falls short of common law forgery that nonetheless threatens the integrity of Michigan elections.[44] The enactment of MCL 168.544c codified additional regulations and sanctions, demonstrating a legislative intent to complement rather than supplant the other provisions of the Michigan Election Law.[45]

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[40] See MCL 168.544c.

[41] See MCL 168.937.

[42] See *United States v Batchelder*, 442 US 114, 121; 99 S Ct 2198; 60 L Ed 2d 755 (1979) (declining to "manufacture ambiguity" to apply rule of lenity where defendant "unquestionably violated" relevant statute, notwithstanding that another statute "provides different penalties for essentially the same conduct").

[43] See *Ford*, 417 Mich at 94-95.

[44] See MCL 168.544c(7) to (9), (11) (providing criminal punishment for conduct that creates false nominating petitions); MCL 168.544c(10), (12), (13) (empowering board of canvassers to impose various sanctions for false signatures and other offenses).

[45] See 1965 PA 312; *Ford*, 417 Mich at 82.

MCL 168.937 explicitly contemplates that the Legislature might specify different or additional punishment by providing for felony punishment "unless herein otherwise provided."

Defendant argues that this Court must read the phrase "unless herein otherwise provided" in MCL 168.937 to mean that MCL 168.544c is an exception to felony punishment for election law forgery. MCL 168.544c provides that the crime of signing another's name to a nominating petition will be punished as a misdemeanor absent proof of specific intent to defraud. MCL 168.544c, however, does not provide that it applies to the exclusion of other provisions of the Michigan Election Law. When statutory crimes are distinct, as here, a prosecutor does not abuse his discretion by charging the greater offense.[46] MCL 168.544c does not preclude additional punishment under MCL 168.937 for those who commit the independent offense of election law forgery.[47]

C. DUE PROCESS

The Due Process Clauses of the United States and Michigan Constitutions provide that the state may not deprive any person of "life, liberty, or property, without

[46] See *Ford*, 417 Mich at 82.

[47] Defendant also argues that the prosecutor cannot charge him with forgery related to the circulation of petitions because MCL 168.544c(15) provides that "[t]he provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law." On this theory, he claims that the prosecutor is limited to charging defendant under MCL 168.544c. The Court of Appeals held, however, that the Legislature created the substantive offense of "forgery under the provisions of this act" in MCL 168.937. *Hall*, unpub op at 6. What logically follows from this is that the Legislature intended MCL 168.937 to provide such an exception to MCL 168.544c(15).

due process of law."[48] Due process requires "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[49] Although defendant does not challenge the Court of Appeals' conclusion that MCL 168.937 created the substantive offense of forgery, he argues he did not receive constitutionally sufficient notice that he could be subject to felony charges for his misconduct because the nominating petitions, as required by MCL 168.544c(1), explicitly stated that a "circulator knowingly making a false statement in the above certificate . . . is guilty of a misdemeanor."

In *United States v Batchelder*, the defendant, a previously convicted felon, was convicted of receiving a firearm that had traveled in interstate commerce, violating 18 USC 922(h).[50] He was sentenced under 18 USC 924(a) to five years in prison.[51] The United States Court of Appeals for the Seventh Circuit remanded his case for resentencing after it concluded that the defendant could only be sentenced to a maximum term of two years under 18 USC 1202(a).[52] The Seventh Circuit held that, because the substantive elements of the two statutes were identical, there was an ambiguity that

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[48] US Const, Am XIV; Const 1963, art 1, § 17. Defendant does not argue that the Michigan Constitution offers greater protection than the United States Constitution. See *AFT Mich v Michigan*, 497 Mich 197, 213; 866 NW2d 782 (2015).

[49] *BMW of North America, Inc v Gore*, 517 US 559, 574; 116 S Ct 1589; 134 L Ed 2d 809 (1996). See also *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003) ("As in any civilized society, punishment should be made to fit the crime and the criminal."), citing *Gore*, 517 US at 576 n 24.

[50] *Batchelder*, 442 US at 116.

[51] *Id*.

[52] *Id*. at 116-117.

must be resolved in favor of the more lenient punishment.[53] The Supreme Court of the United States reversed.

The Supreme Court agreed that the statutes overlapped, "both as to the conduct they proscribe and the individuals they reach," but concluded that "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other."[54] Each statute was fully enforceable on its own terms because each provision gave defendant fair notice:

> The provisions in issue here . . . unambiguously specify the activity proscribed and the penalties available upon conviction. That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.[55]

We agree with the above-quoted reasoning of the Supreme Court in *Batchelder*. Defendant's conduct was clearly proscribed by both MCL 168.544c and MCL 168.937, and each statute unambiguously specifies the penalties available upon conviction. The warnings on the nominating petitions did not detract from this clear statutory notice. As previously explained, these statutes operate with independent force; MCL 168.544c does not limit the application of MCL 168.937. The warning language prescribed by MCL 168.544c(1) con-

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[53] *Id*.

[54] *Id*. at 118.

[55] *Id*. at 123 (citation omitted).

veyed to defendant that he would be guilty of a misdemeanor if he knowingly made a false statement in the circulator's certificate. Defendant, however, is charged with different conduct, forgery, and the warning simply does not cover that conduct. A second warning states, however, that someone who "signs a name other than his or her own is violating the provisions of the Michigan election law."[56] That warning does not prescribe the penalty as a misdemeanor. In short, a defendant may not know under which statute a prosecutor will *actually* charge him, but when a defendant falsely signs other people's names on a nominating petition, making a false document with fraudulent intent, MCL 168.937 gives him fair notice his conduct *may* be charged as a felony.[57]

Defendant's prosecution under MCL 168.937 did not violate "fundamental elements of fairness"[58] given the Court of Appeals' holding that MCL 168.937 is a substantive offense and given that the plain text of that statute informed him he could be subject to felony charges if he committed election law forgery, a crime distinct from the misdemeanor defined in MCL 168.544c.[59]

IV. CONCLUSION

The lower courts erred when they concluded that MCL 168.544c and MCL 168.937 conflict. Instead, each statute applies independently to punish defendant's intentional falsification of nominating petitions. MCL 168.937 prohibits forgery, or the making of a false

[56] MCL 168.544c(1).

[57] See *Ford*, 417 Mich at 80.

[58] *Hall*, unpub op at 10.

[59] *Batchelder*, 442 US at 123.

document under the Michigan Election Law with the intent to defraud, and punishes forgery as a felony. MCL 168.544c, a misdemeanor offense, proscribes the specific act of signing another's name to a nominating petition and does not require proof of a specific intent to defraud. If proved, the facts as alleged in this case establish that defendant violated both statutes. Prosecuting defendant for felonies committed in violation of MCL 168.937 is barred neither by tie-breaking canons of statutory interpretation nor principles of due process.

We reverse the decision of the Court of Appeals and remand this case to the 58th District Court for further proceedings consistent with this opinion.

MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with YOUNG, C.J.

KOZAK v CITY OF LINCOLN PARK

Docket No. 152514. Decided July 1, 2016.

Barbara A. Kozak and Kevin J. Kozak brought a negligence action in the Wayne Circuit Court against the city of Lincoln Park after Barbara Kozak tripped over a three-inch elevation differential between two slabs of concrete that met at the centerline of a highway in the city. Plaintiffs alleged that defendant was liable for the resulting injuries under the highway exception to governmental immunity, MCL 691.1402(1), because defendant had failed to maintain the highway in reasonable repair. Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (10), which it supported with an affidavit from its public services director stating that the height differential did not render the highway either unsafe or inconvenient for public travel. In response, plaintiffs submitted photographs of the height differential, an affidavit from a local resident stating that the roadway had been in that condition for about six years, and defendant's admission that no maintenance, paving, or repaving had been done to that portion of the highway before the incident. The court, Kathleen Macdonald, J., granted defendant's motion, and the Court of Appeals, CAVANAGH and SAAD, JJ. (BECKERING, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued July 21, 2015 (Docket No. 319797). Plaintiffs appealed.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

The trial court should have denied defendant's motion for summary disposition, and the Court of Appeals erred by concluding to the contrary. From the evidence proffered by plaintiffs, including photographic proof of a significant gap of elevation between the slabs of pavement, a reasonable jury could conclude that the highway was not in a state of reasonable repair so that it was reasonably safe and convenient for public travel. The only evidence submitted by defendant was the affidavit of its public services director, which merely articulated his opinion that the condition did not render the highway unsafe or inconvenient for

public travel. This conclusory statement was insufficient to support defendant's motion for summary disposition.

Court of Appeals judgment reversed; case remanded to the circuit court for further proceedings.

Martin N. Fealk and *James E. Brittain* for plaintiffs.

Pedersen, Keenan, King, Wachsberg & Andrzejak, PC (by *Michael M. Wachsberg*), and *Garan Lucow Miller, PC* (by *Rosalind Rochkind*), for defendant.

MEMORANDUM OPINION. The sole issue in this case is whether the lower courts erred by concluding that plaintiffs failed to provide sufficient evidence of a highway defect such that reasonable jurors could conclude that the highway was not in a state of reasonable repair for purposes of the "highway exception" to governmental immunity, MCL 691.1402(1). Because we conclude that plaintiffs presented sufficient evidence to avoid summary disposition, we reverse the judgment of the Court of Appeals and remand to the Wayne Circuit Court for further proceedings not inconsistent with this opinion.

Plaintiff Barbara Kozak alleged she was injured while crossing Kings Highway in Lincoln Park when she tripped over a three-inch elevation differential between the two slabs of concrete that met at the centerline of the street. Kozak and her husband brought the instant action against defendant, the city of Lincoln Park, pursuant to the "highway exception," alleging that defendant failed to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." Defendant moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). The trial court granted defendant's

motion, and the Court of Appeals, in a divided unpublished opinion, affirmed, concluding that plaintiffs did not provide evidence to counter defendant's assertions that the road was reasonably safe and convenient for public travel.[1]

This Court reviews de novo a trial court's determination regarding a motion for summary disposition.[2]

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., affords broad immunity from tort liability to governmental agencies and their employees whenever they are engaged in the exercise or discharge of a governmental function.[3] The GTLA provides several exceptions to this general rule, all of which must be narrowly construed.[4] One such exception, the "highway exception," is contained in MCL 691.1402 and states in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

This exception encompasses injuries to pedestrians.[5]

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[1] *Kozak v Lincoln Park*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2015 (Docket No. 319797).

[2] *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012), citing *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[3] MCL 691.1407(1).

[4] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

[5] See *Nawrocki*, 463 Mich at 171-172.

In support of its motion, defendant submitted only the affidavit of Robert Bartok, defendant's Director of Public Services, in which Bartok offered his opinion that the height differential "does not render the highway either unsafe or inconvenient for public travel" and that "the highway in this area is in fact reasonably safe and convenient for public travel." Plaintiff countered by submitting various forms of documentary evidence in support of their action, including photographs of the height differential, an affidavit from a local resident who stated that the roadway had been in that condition for about the last six years, and excerpts from Barbara's deposition, in which she described her fall. Plaintiffs also submitted defendant's answer to written interrogatories, in which defendant admitted that "no maintenance, paving or repaving was done to 813 King's Highway prior to the alleged date of the fall."

Considering defendant's conclusory affidavit alongside the evidence submitted by plaintiffs, we conclude that plaintiffs created a genuine issue of material fact giving rise to a reasonable inference that the highway was not in reasonable repair. Based on the evidence proffered by plaintiffs, including photographic proof of a significant gap of elevation between the slabs of pavement, a reasonable jury could conclude that the highway was not in a state of reasonable repair so that it was reasonably safe and convenient for public travel. The only evidence submitted by defendant was the affidavit of Bartok, which merely articulated his opinion that the condition did not render the highway unsafe or inconvenient for public travel. An affidavit that contains mere conclusory statements is insufficient to support a motion for summary disposition.[6]

[6] See *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002) (stating that conclusory statements are not enough to create

Consequently, we conclude that the trial court should have denied defendant's motion for summary disposition, and the Court of Appeals erred by concluding to the contrary.[7] We therefore reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

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a genuine issue of material fact under MCR 2.116(C)(7)); *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996) (stating that an affidavit with mere conclusory allegations was insufficient to avoid summary disposition under MCR 2.116(C)(10)).

[7] In dissent, Judge BECKERING focused on the trial court's application of an excerpt from this Court's decision in *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 169; 713 NW2d 717 (2006), in which the Court stated that "to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." We agree with the dissent that, when read in context, this language in *Wilson* does not require a plaintiff to submit evidence that literally describes what a reasonable road commission would do under the facts of each particular case, but rather that a plaintiff must submit evidence that the defect in question was of such a nature that it would have been apparent to a reasonable road commission that the defect rendered the highway not reasonably safe. However, we note that the Court of Appeals majority did not misconstrue this excerpt from *Wilson*, but instead focused on a sufficiency-of-the-evidence analysis.

BERNARDONI v CITY OF SAGINAW

Docket No. 152097. Decided July 5, 2016.

Sue Bernardoni brought a negligence action in the Saginaw Circuit Court against the city of Saginaw after she tripped on a 2.5-inch vertical discontinuity between adjacent sidewalk slabs. Plaintiff alleged that defendant was liable for the resulting injuries under the highway exception to governmental immunity, MCL 691.1402(1), for having failed to maintain the sidewalk in reasonable repair. In support of her allegation, plaintiff submitted photographs of the sidewalk discontinuity that were taken about 30 days after her accident. Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and the court, Janet M. Boes, J., granted defendant's motion without indicating under which rule. The Court of Appeals, RONAYNE KRAUSE, P.J., and MURPHY and SERVITTO, JJ., reversed in an unpublished opinion per curiam issued June 23, 2015 (Docket No. 320601), noting that the trial court had not granted summary disposition under MCR 2.116(C)(8) and holding that summary disposition was improper under either MCR 2.116(C)(7) or (10) because reasonable minds could have differed regarding whether the discontinuity would have been present and readily apparent for at least 30 days before the injury. Defendant appealed.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

For purposes of the highway exception, plaintiff's photographs of a sidewalk defect taken about 30 days after an accident alone did not create a genuine issue of material fact as to whether the sidewalk defect existed at least 30 days before the accident as required under MCL 691.1402a(2). Without more, a jury would have had no basis for concluding that the defect was present for the requisite period of time. Accordingly, defendant was entitled to summary disposition under MCR 2.116(C)(10).

Court of Appeals judgment reversed; trial court order dismissing the case reinstated.

Brett Meyer and *Gregory W. Mair* for the city of Saginaw.

MEMORANDUM OPINION. At issue is whether for purposes of the "highway exception" to governmental immunity from tort claims, MCL 691.1402, plaintiff's photographs of a sidewalk defect taken about 30 days *after* plaintiff's accident are sufficient evidence to establish a genuine issue of material fact regarding whether the defect existed at least 30 days *before* the accident. We conclude that such evidence alone is not probative of a sidewalk's past condition and is thus insufficient, without more, to forestall summary disposition. Consequently we reverse the Court of Appeals judgment and reinstate the trial court's dismissal of plaintiff's action.

Plaintiff was walking on a sidewalk in defendant city when she was injured after tripping on a 2.5-inch vertical discontinuity between adjacent sidewalk slabs. She sued defendant, alleging *inter alia* that the sidewalk's hazardous condition had existed for more than 30 days before her fall. However, in her deposition, she stated that she did not know for how long the discontinuity had existed. The only relevant evidence she submitted was three photographs of the defect taken by plaintiff's husband about 30 days after the accident. The photographs depict a raised portion of a sidewalk, each taken from a different perspective and seemingly from a different distance. In two of the photographs, a ruler is used to indicate the size of the discontinuity in the sidewalk.

In the trial court, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court found plaintiff's photographs insufficient to establish the defect's origin and dura-

tion and granted summary disposition without specifying under which rule it had granted the motion. On appeal, the Court of Appeals noted that the trial court had reviewed material outside of the pleadings and therefore concluded that the trial court could not have granted summary disposition under MCR 2.116(C)(8). *Bernardoni v Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2015 (Docket No 320601), at 1, citing *Spiek v Dep't of Transp*, 456 Mich 331, 338, 572 NW2d 201 (1998). The Court of Appeals found summary disposition improper under both MCR 2.116(C)(7) and (C)(10). *Bernardoni*, unpub op at 2. Specifically with respect to MCR 2.116(C)(10), the Court of Appeals reasoned that "in consideration of the high unlikeliness that sidewalk[] slabs could shift, wear, and accumulate debris with great rapidity, reasonable minds could differ as to whether the condition would have been present and readily apparent for at least 30 days before the injury." *Id*. For the reasons stated below, we conclude that defendant is entitled to summary disposition under MCR 2.116(C)(10). Accordingly, we reverse the Court of Appeals on this ground and reinstate the trial court's dismissal.[1]

We review de novo a trial court's decision regarding a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. The Court considers all affidavits, pleadings, depositions, admissions, and

[1] Because we find summary disposition appropriate under MCR 2.116(C)(10), we decline to consider whether summary disposition is also appropriate under MCR 2.116(C)(7).

other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. MCR 2.116(G)(4) states:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

This rule requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Maiden*, 461 Mich at 121. A reviewing court should consider the substantively admissible evidence actually proffered by the opposing party. *Id*. When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120.

Under the governmental tort liability act, MCL 691.1401 *et seq*., "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). An exception to this immunity is found in MCL 691.1402, the highway exception, that allows individuals to "recover the damages suffered by him or her" resulting from a municipality's failure to keep highways—including sidewalks, MCL 691.1401(c)—"in reasonable repair and in a condition reasonably safe and fit for travel . . . ." MCL 691.1402(1); see also *Robinson v City of Lansing*, 486 Mich 1, 7; 782 NW2d 171 (2010). When the liability

allegedly arises from a sidewalk defect, a plaintiff must meet additional requirements:

> A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk. [MCL 691.1402a(2).]

A defendant is "conclusively presumed" to have knowledge of the defect "when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." MCL 691.1403. Thus, to invoke the highway exception as it pertains to sidewalks, a plaintiff must show that the defect existed at least 30 days before the accident. *Robinson*, 486 Mich at 19 ("MCL 691.1402a(1)(a) and MCL 691.1403 are virtually identical; they both limit a municipality's liability to instances in which the municipality knew or should have known of the defect at least 30 days before the injury took place."). "Generally, the question of whether a street defect, otherwise actionable against the municipality, 'has existed a sufficient length of time and under such circumstances that the municipality is deemed to have notice is a question of fact, and not a question of law.' " *Cruz v Saginaw*, 370 Mich 476, 481; 122 NW2d 670 (1963), quoting *Hendershott v Grand Rapids*, 142 Mich 140, 143; 105 NW 140 (1905); see also *Beamon v Highland Park*, 85 Mich App 242, 246; 271 NW2d 187 (1978).

In the instant case, after discovery had closed, defendant moved for summary disposition, arguing, *inter alia*, that there was no genuine issue of material fact that defendant did not know or have reason to

know of the alleged defect. In opposition, plaintiff submitted as her only proof the aforementioned photographs of the alleged sidewalk defect taken about 30 days after the incident. No evidence was submitted to establish that the condition of the sidewalk in the photographs was the same 30 days before the incident. For the following reasons, these photographs are insufficient to raise a genuine issue of material fact regarding whether the defect originated at least 30 days before the incident.

Plaintiff acknowledges that these photographs were taken about 30 days after the incident. Therefore, the images of the sidewalk condition in the photographs do not show the sidewalk's condition 30 days before the incident, as required by MCL 691.1402a(2). Furthermore, the photographs alone fail to give rise to a reasonable inference that the defect had been present for at least 60 days. The photographs merely show the alleged defect from several different angles and indicate the size of the defect. The basis for the Court of Appeals' finding of such an inference was the accumulated debris seen in the photographs. But that inference amounts merely to speculation, relying on the assumption that the debris, and thus the defect itself, could not have arisen in *less* than 60 days. Thus, even when viewed in the light most favorable to plaintiff, the photographs standing alone cannot permit the conclusion that the defect existed 30 days before the incident.

The necessary inference that would connect the photographs to the sidewalk's condition 60 days earlier becomes tenable only with additional evidence. Absent such evidence, one can imagine any number of scenarios in which the defect formed *within* 60 days of when the photographs were taken. Yet plaintiff has offered no evidentiary support of any kind for her

assumptions that the defect existed for the necessary amount of time. For example, she has offered no affidavits from neighbors who viewed the sidewalk 30 days before the accident, nor did she introduce expert testimony demonstrating that the sidewalk discontinuity was of a type that usually forms or enlarges over a long period of time. Such additional evidence might have narrowed or closed the inferential gap between the photographs and the conclusions plaintiff and the Court of Appeals drew from them. Instead, plaintiff's attempt to prove the sidewalk's past condition simply by proving its current condition fails, as more is needed to explain why the current condition is probative of the past condition. Cf. *Beamon*, 85 Mich App at 246 ("[P]laintiff merely proved that the defect existed at the moment of her fall. Absent additional evidence, it was not reasonable to infer that the defect was sufficiently long-standing and/or notorious in support of the jury verdict of constructive notice.").

For these reasons, we hold that for purposes of the highway exception, plaintiff's photographs of a sidewalk defect taken about 30 days after an accident alone do not create a genuine issue of material fact as to whether the sidewalk defect existed at least 30 days before the accident. Without more, a jury has no basis for concluding that the defect was present for the requisite period of time. Because plaintiff has provided photographs of the defect only as it existed about 30 days after her fall and has not explained why these photographs indicate the state of the sidewalk 60 days earlier, she cannot withstand summary disposition. We thus reverse the Court of Appeals judgment and reinstate the trial court's dismissal of plaintiff's action.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

In re CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(DEACON v PANDORA MEDIA, INC)

Docket No. 151104. Argued on request to answer the certified question April 27, 2016. Decided July 6, 2016.

Peter Deacon, individually and on behalf of all others similarly situated, brought an action in the United States District Court for the Northern District of California against Pandora Media, Inc., which operates a music-streaming program through the Internet that allows each listener to create a unique, customized radio station based on, for example, a preferred artist or musical genre. The music that Pandora streams becomes increasingly refined to more closely match the listener's music preferences as the listener indicates to Pandora whether he or she likes or dislikes particular songs being played. The listener may skip or bypass a song, but may not save, fast forward, or rewind a song. In addition, the listener cannot select the particular song to be played but must restrict himself or herself to the song selected by Pandora. Pandora is free, although listeners may elect to pay a fee to use a version of Pandora that does not have commercials. There was no indication that Deacon chose that option. Deacon claimed, in relevant part, that Pandora had violated the preservation of personal privacy act (PPPA), MCL 445.1711 *et seq*. (also commonly known as the video rental privacy act or VRPA), by publically disclosing personal information concerning his music preferences. The court ruled in Pandora's favor and dismissed Deacon's claim. 901 F Supp 2d 1166 (ND Cal, 2012). Deacon appealed in United States Court of Appeals for the Ninth Circuit, and, pursuant to MCR 7.305(B)(1) (now MCR 7.308(A)(2)), that court certified the following question to the Supreme Court:

> Has Deacon stated a claim against Pandora for violation of the [PPPA] by adequately alleging that Pandora is [in] the business of "renting" or "lending" sound recordings, and that he is a "customer" of Pandora because he "rents" or "borrows" sound recordings from Pandora?

Furthermore, in certifying the question, the Ninth Circuit noted that the particular phrasing used in the certified question was not intended to restrict the Supreme Court's consideration of the problems involved or the issues as the Supreme Court perceived them to be in its analysis of the record certified in the case. The Supreme Court ordered and heard oral argument on whether to answer the certified question. 498 Mich 882 (2015).

In a unanimous opinion by Justice MARKMAN, the Supreme Court *held*:

At all relevant times, the version of the PPPA originally enacted by 1988 PA 378 applied to this case. MCL 445.1712 prohibited certain persons from disclosing any record or information concerning the purchase, lease, rental, or borrowing of books or other written materials, sound recordings, or video recordings by a customer that indicates the identity of the customer. Under MCL 445.1715, only a customer may bring a civil action for a violation of the PPPA. In the context of this case, MCL 445.1711(a) defined a customer as a person who rents or borrows a sound recording. The Supreme Court limited the question in this case to whether Deacon could be characterized as a customer of Pandora because he was a person who rented or borrowed sound recordings from Pandora. The verb "rent" contemplates some form of payment. For a Pandora listener to constitute a person who rents a sound recording, he or she must, at a minimum, provide a payment to Pandora in exchange for that recording. Deacon was not a person who rented a sound recording because he did not give any payment for it. The verb "borrow" contemplates some promise to return the borrowed subject matter or its equivalent. Deacon was not a person who borrowed a sound recording because there was no promise, implied or expressed, that he would return the sound recording or its equivalent to Pandora. The music-streaming program offered by Pandora only involved the delivery of a sound recording to the listener. Therefore, Deacon was not a customer of Pandora under the PPPA because he neither rented nor borrowed a sound recording from Pandora.

Certified question, as limited by the Supreme Court, answered in the negative.

Chief Justice YOUNG, concurring, joined the majority opinion in full and wrote separately only to explain why, given his longstanding views on the questionable constitutionality of responding to certified questions from federal courts, he choose to participate in responding to the certified question in this case. Chief Justice YOUNG believed that, as a prudential matter, the

> Supreme Court should accept and answer certified questions from the federal courts sparingly and only when the Michigan legal issue is a debatable one and pivotal to the federal case that prompted the request for the certified question. The Michigan legal issue here—whether Deacon was a customer who rented or borrowed sound recordings under the PPPA—was determinative to the federal case and a debatable question actively contested by the parties. The case called for the federal courts to interpret and apply a statute rarely seen in Michigan courts to new technologies not in existence when the statute was enacted, and the majority opinion gave effect to the plain and ordinary meaning of the PPPA's provisions.

Edelson PC (by *Jay Edelson* and *Ryan D. Andrews*) for Peter Deacon.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Krista L. Lenart*) for Pandora Media, Inc.

MARKMAN, J. Plaintiff, Peter Deacon, filed suit against defendant, Pandora Media, Inc., in the United States District Court for the Northern District of California, claiming in relevant part that defendant had violated the preservation of personal privacy act (PPPA), MCL 445.1711 *et seq*.,[1] by publically disclosing personal information concerning his music preferences. The federal district court ruled in favor of defendant, and under MCR 7.305(B),[2] the United States Court of Appeals for the Ninth Circuit certified the following question to this Court:

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[1] While other courts have referred to this statute as the "video rental privacy act" (VRPA), its provisions also cover books, written materials, and sound recordings. Accordingly, we will refer to it throughout this opinion as the "preservation of personal privacy act" (PPPA).

[2] When the question was certified, MCR 7.305(B)(1) provided that "[w]hen a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court." Effective September 1, 2015, the court rule was

> Has Deacon stated a claim against Pandora for violation of the VRPA by adequately alleging that Pandora is [in] the business of "renting" or "lending" sound recordings, and that he is a "customer" of Pandora because he "rents" or "borrows" sound recordings from Pandora?

Furthermore, in certifying the question, the Ninth Circuit noted that

> "the particular phrasing used in the certified question[s] is not to restrict the [Michigan] Supreme Court's consideration of the problems involved and the issues as the [Michigan] Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the [Michigan] Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts." [*Deacon v Pandora Media, Inc.*, unpublished amended order of the United States Court of Appeals for the Ninth Circuit, entered February 24, 2015 (Case No. 12-17734), p 12, quoting *Martinez v Rodriquez*, 394 F2d 156, 159 n 6 (1968) (alterations in original).]

Having now heard oral argument and considered the issues involved, we grant the Ninth Circuit's request to answer its question. However, we limit the question to whether plaintiff can be characterized under the PPPA as a "customer" of defendant because at the relevant time he was a person who "rent[ed]" or "borrow[ed]" sound recordings from defendant. We conclude that plaintiff was not such a "customer."

I. FACTS AND HISTORY

Defendant is a Delaware corporation with its principal place of business in California. It operates a music-streaming program through the Internet called

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renumbered as MCR 7.308(A)(2) with a few slight changes in wording.

"Pandora"[3] that allows each listener to create a unique, customized "radio station" based on, for instance, a preferred artist or musical genre. Thereafter, the music streamed by Pandora becomes increasingly refined to more closely match the listener's music preferences as the listener indicates to Pandora whether he or she likes or dislikes particular songs being played.[4] The listener may skip or bypass a song, but may not save, fast forward, or rewind a song. In addition, the listener cannot select the particular song to be played, but must restrict himself or herself to the song selected by Pandora. Pandora is free, although listeners may elect to pay a fee to use a version of Pandora that does not have commercials.

In September 2011, plaintiff, a Michigan resident, sued defendant in the federal district court. He alleged that defendant (a) made its listeners' profile pages, each of which included information about the listener's music preferences, "publicly available and searchable on the World Wide Web for anyone to view" and (b) "unilaterally integrated its [listeners'] profile pages with their Facebook accounts."[5] According to plaintiff, that integration resulted in the public release of "sensitive listening records to all of [a listener's] Facebook 'friends.' " As a consequence of these two disclosures,

[3] "A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. . . . [T]here is a playing of the song that is perceived simultaneously with the transmission." *United States v American Society of Composers, Authors & Publishers*, 627 F3d 64, 74 (CA 2, 2010).

[4] As described by defendant in the Form S-1 Registration Statement it filed with the Securities and Exchange Commission, Pandora "uses intrinsic qualities of music to initially create stations and then adapts playlists in real-time based on the individual feedback of each listener."

[5] During the proceedings in the Ninth Circuit, the parties disputed whether the allegedly disclosed information concerning plaintiff's music preferences connected those preferences with his full name. We do not address that dispute.

plaintiff claimed, defendant had violated both the PPPA and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiff sought monetary and equitable relief for himself and on behalf of a putative class of all Michigan residents who were registered listeners of Pandora before August 5, 2010, and who allegedly had suffered similar public disclosures of personal information. The federal district court granted defendant's motion to dismiss both claims. *Deacon v Pandora Media, Inc*, 901 F Supp 2d 1166 (ND Cal, 2012). Plaintiff appealed the dismissal of his PPPA claim in the Ninth Circuit, and that court certified the present question to this Court.[6] We ordered oral argument on whether to grant the request to answer this question, *In re Certified Question from the United States Court of Appeals for the Ninth Circuit*, 498 Mich 882 (2015), and argument was heard on April 27, 2016.

II. STANDARD OF REVIEW

"This Court reviews de novo issues of statutory interpretation." *In re COH*, 495 Mich 184, 191; 848 NW2d 107 (2014).

III. ANALYSIS

"Our goal in interpreting a statute 'is to give effect to the Legislature's intent, focusing first on the statute's plain language.' " *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013), quoting *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). "[W]ords used by the Legislature must be construed and understood in accordance with their common, ordinary meaning." *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). "When the

[6] Plaintiff did not appeal the dismissal of his MCPA claim, and that claim is not at issue here.

language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015).

The title of the PPPA states that it is

> [a]n act to preserve personal privacy with respect to the purchase, rental, or borrowing of certain materials; and to provide penalties and remedies for violation of this act.[7]

At all times relevant to this case, MCL 445.1712 of the PPPA prohibited the disclosure of certain materials:

> Except as provided in [MCL 445.1713] or as otherwise provided by law, a person, or an employee or agent of the person, engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings shall not disclose to any person, other than the customer, a record or information concerning the purchase, lease, rental, or borrowing of those materials by a customer that indicates the identity of the customer.[8]

Furthermore, MCL 445.1711(a) of the PPPA defined "customer" as follows:

> "Customer" means a person who purchases, rents, or borrows a book or other written material, or a sound recording, or a video recording.[9]

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[7] 1988 PA 378, title. On May 2, 2016, while this case was pending before this Court, the Governor signed into law 2016 PA 92, effective July 31, 2016. That public act amends the PPPA in several respects, but not in any respect that affects our analysis here. Our opinion refers only to the version of the PPPA in effect at the time of the events giving rise to this case.

[8] MCL 445.1713(a) to (e) set forth five exceptions to the general prohibition against disclosure under MCL 445.1712. None of these exceptions is relevant here. 2016 PA 92 adds a sixth exception to MCL 445.1713, effective July 31, 2016.

[9] Effective July 31, 2016, MCL 445.1711(a) will provide that " '[c]ustomer' means an individual who purchases, rents, or borrows a book, other written material, a sound recording, or a video recording." See 2016 PA 92.

Finally, MCL 445.1715 of the PPPA provided a civil remedy for its violation:

> Regardless of any criminal prosecution for a violation of this act, a person who violates this act shall be liable in a civil action for damages to the customer identified in a record or other information that is disclosed in violation of this act. The customer may bring a civil action against the person and may recover both of the following:
>
> (a) Actual damages, including damages for emotional distress, or $5,000.00, whichever is greater.
>
> (b) Costs and reasonable attorney fees.

Under MCL 445.1715, only a "customer" may bring a civil action for a violation of the PPPA. For the reasons that follow, we conclude that plaintiff was not a "customer" as defined by MCL 445.1711(a) because he neither "rent[ed]" nor "borrow[ed]" a sound recording.[10] Accordingly, we need not address whether plaintiff established the remaining elements of a PPPA claim, such as, for example, whether the PPPA applied to defendant because it was "engaged in the business of . . . renting, or lending . . . sound recordings" under MCL 445.1712.

The PPPA does not define either "rent" or "borrow." "When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008). In this regard, it is best to consult a dictionary from the era in which the legislation was enacted. See *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005) ("Because the statute itself does not define 'loss,' . . . we must ascertain the original meaning the

[10] Plaintiff does not argue that he "purchase[d]" a sound recording for the purposes of MCL 445.1711(a).

word 'loss' had when the statute was enacted in 1912."). Because the PPPA was enacted in 1988, we consult dictionaries from that era to define those words. Furthermore, because those words are used as verbs in the statute, we identify the definitions of those words as verbs.

Concerning "rent," *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987) defines the transitive form of the verb "rent" as "to take and hold (property, machinery, etc.) in return for the payment of rent . . . ." Because the dictionary definition of the verb "rent" incorporates the noun "rent," we also determine the definition of the noun form of that word. The noun "rent" is defined as "a payment or series of payments made by a lessee to an owner in return for the use of machinery, equipment, etc."[11] *Id*. Thus, for a listener to constitute a person who "rents" a sound recording, he or she must, at a minimum, provide a payment in exchange for that recording. Stated otherwise, the word "rent" contemplates some form of payment. Here, however, there is nothing to suggest that plaintiff was one of those listeners who paid the optional fee to receive sound recordings using the commercial-free version of Pandora. Further, there is nothing to suggest that plaintiff otherwise provided any payment to defendant in exchange for a sound recording. Thus, because plaintiff did not provide a payment for a sound recording,[12] we conclude that he

[11] By referring to this definition of the noun "rent," we express no opinion on whether plaintiff may be characterized as the "lessee" or defendant may be characterized as the "owner" of sound recordings.

[12] Plaintiff summarily asserts in a footnote that he was a person who "rent[ed]" a sound recording because he "gave Pandora 'rent' in the form of advertising impressions and valuable personal and demographic information." We conclude that this argument has been abandoned because plaintiff has provided no support for it. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an

was not "a person who . . . rents . . . a sound recording . . . ."[13] MCL 445.1711(a).

Concerning "borrows," *The Random House Dictionary of the English Language*: *Second Unabridged Edition* (1987) defines the verb "borrow" as "to take or obtain with the promise to return the same or an equivalent[.]" Thus, the word "borrow" contemplates some promise to return the borrowed subject matter or its equivalent. As applied here, plaintiff was not a person who "borrow[ed]" a sound recording because there was no promise, implied or expressed, that he would ever "return" the sound recording or its equivalent to defendant. Put simply, the music-streaming program offered by defendant only involved the *delivery* of a sound recording to the listener; there was no corresponding "return" of a recording or its equivalent from the listener to defendant. *American Broadcasting Cos, Inc v Aereo, Inc*, 573 US ___, ___; 134 S Ct 2498, 2503; 189 L Ed 2d 476 (2014) ("See A Dictionary of Computing 494 (6th ed. 2008) (defining 'streaming' as '[t]he process of providing a steady flow of audio or video

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appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Thus, we will not further address the argument.

[13] Although we conclude that plaintiff was not a person who "rent[ed]" a sound recording because he did *not* provide a payment for it, we do not intend to suggest that the opposite conclusion would necessarily result if plaintiff *had* provided a payment. That is, we do not address the parties' arguments concerning whether and to what extent, if any, it is only possible to "rent" a sound recording through "use" or "control." Compare the statement in defendant's supplemental brief on appeal that "the District Court correctly found the Complaint to be deficient because it is devoid of factual allegations sufficient to support a plausible claim that Plaintiff exercised, over the temporary Internet file, the type of use and control inherent in a 'borrowing' or 'renting' relationship" with the statement in plaintiff's supplemental brief on appeal that "the word 'use' never appears in the [PPPA] so the entire line of argument focused on 'use' is utterly misplaced."

data so that an Internet user is able to access it as it is transmitted').") (alteration in original); *Microsoft Computer Dictionary*, Fourth Edition (Washington: Microsoft Press, 1999), p 425 (defining "streaming" as "the process of delivering information, especially multimedia sound or video, in a steady flow that the recipient can access as the file is being transmitted").[14] Nothing in the present dispute suggests that plaintiff or defendant promised anything more. We accordingly conclude that plaintiff was not "a person who . . . borrows . . . a sound recording . . . ."[15] MCL 445.1711(a).

IV. CONCLUSION

At all relevant times, MCL 445.1711(a) provided that " '[c]ustomer' means a person who . . . rents, or

[14] Although we recognize that the federal district court dismissed the PPPA claim under FR Civ P 12(b)(6) on the basis of its conclusion that plaintiff had "not alleged facts showing that Pandora rented, lent and/or sold music to him," *Deacon*, 901 F Supp 2d at 1176, and that he appealed the denial in the Ninth Circuit, we do not respond to the certified question to apply federal law concerning FR Civ P 12(b)(6) to his complaint. Rather, we only resolve an issue of Michigan law. In this regard, as stated previously, the Ninth Circuit, quoting *Martinez*, 394 F2d at 159 n 6, has asserted that " 'the particular phrasing used in the certified question[s] is not to restrict the [Michigan] Supreme Court's consideration of the problems involved and the issues as the [Michigan] Supreme Court perceives them to be . . . .' (Alterations in original.) In our judgment, the issue of Michigan law is best resolved without restricting it by the allegations in plaintiff's complaint. Thus, we will not answer the question presented here on the basis of an allegation unsupported by the record—that the sound recording is physically removed from the listener's computer and returned to defendant, which allegation appears to be contrary to the basic definition of "streaming" found in computer dictionaries—simply because the question encompasses the phrase "stated a claim."

[15] As with our conclusion concerning the word "rents," our conclusion concerning the word "borrows" leaves unresolved the issue of whether and to what extent, if any, it is only possible to "borrow" a sound recording through "use" or "control." See note 13 of this opinion.

borrows . . . a sound recording . . . .” We hold that plaintiff was not a person who “rent[ed]” a sound recording because he did not give payment for it. We further hold that plaintiff was not a person who “borrow[ed]” a sound recording because there was no promise, implied or expressed, that he would “return” the sound recording or its equivalent to defendant. We therefore conclude that plaintiff was not a “customer” of defendant under the PPPA because he was not a person who “rent[ed]” or “borrow[ed]” a sound recording from defendant.[16]

YOUNG, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MARKMAN, J.

YOUNG, C.J. (*concurring*). I join the majority opinion in full and write only to explain why, given my long-standing views on the questionable constitutionality of responding to certified questions from federal courts, I choose to participate in responding to the instant certified question.[1]

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[16] We recognize that in our digitized world it is possible to transmit audio or visual materials on a temporary basis absent any “return” of those materials. Our conclusion that plaintiff was not one who “borrow[ed]” a sound recording is directed by the language of the PPPA. To the extent that there are some who believe that the law should direct a different result, those arguments should be addressed to the Legislature. *People v Dunbar*, 499 Mich 60, 72; 879 NW2d 229 (2016) (“[W]hen the people wish to argue that a statute is unwise or results in bad policy, those arguments should be addressed to the Legislature.”) (quotation marks and citation omitted).

[1] See *In re Certified Question from the United States Dist Court for the Western Dist of Mich*, 493 Mich 70, 83; 825 NW2d 566 (2012) (YOUNG, C.J., dissenting) (“I continue to believe that this Court lacks the constitutional authority to issue advisory opinions other than as described in article 3, § 8 of Michigan’s 1963 Constitution. My position regarding the Court’s constitutional authority did not prevail, and I accept that the Court has determined otherwise.”) (citations omitted).

As I have stated previously, because of my constitutional reservations about responding to federal certified questions, I believe this Court should, as a prudential matter, "accept and answer certified questions from the federal courts sparingly and only when the Michigan legal issue is a debatable one and pivotal to the federal case that prompted the request for the certified question."[2]

The United States Court of Appeals for the Ninth Circuit has asked whether plaintiff has stated a claim upon which relief may be granted under the preservation of personal privacy act (PPPA), MCL 445.1711 *et seq*. The Michigan legal issue here—whether plaintiff is a "customer" under the PPPA who "rents" or "borrows" sound recordings—is determinative to the federal case.[3] Further, the legal question here is a debatable one actively contested by the parties on appeal in this Court.[4] By contrast, in *Certified Question*, the plaintiff could have prevailed only if a court construed a statutory term in a way that was completely inconsistent with the plain meaning of our succession statute.[5] I believe the majority has given effect to the plain and ordinary meaning of MCL 445.1711 and MCL 445.1712 of the PPPA, but the resolution of this dispute was not as immediately apparent as it was in *Certified Question*, in which the answer to the question of whether children created by in vitro fertilization *after*

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[2] *Id*. at 83-84.

[3] See MCL 445.1711 and MCL 445.1712; *Certified Question*, 493 Mich at 84 (YOUNG, C.J., dissenting).

[4] Compare *Certified Question*, 493 Mich at 84-85 (YOUNG, C.J., dissenting) ("[T]he question whether the children may be considered to have been alive at the time of their father's death is not debatable under our intestacy laws—a point plaintiff's counsel conceded at oral argument.").

[5] See *id*. at 85.

the father's death were "in gestation" *during* the father's lifetime was patently clear and not contested.[6]

This case called for the federal courts to interpret and apply a statute rarely seen in our state courts to new technologies not in existence at the time the statute was enacted. I believe that the question is sufficiently nuanced that this Court, as a prudential matter, properly responded by answering the question for the federal court.

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[6] See *id*. at 85-86.

INNOVATION VENTURES v LIQUID MANUFACTURING

Docket No. 150591. Argued March 16, 2016 (Calendar No. 1). Decided July 14, 2016.

Plaintiff, Innovation Ventures, LLC, filed an action in the Oakland Circuit Court against defendants, Liquid Manufacturing, LLC; K & L Development, LLC; LXR Biotech, LLC; Eternal Energy, LLC; Andrew Krause; and Peter Paisley. Krause was the managing member of K & L Development. Paisley was the president and CEO of Liquid Manufacturing. Krause and Paisley together founded LXR Biotech and Eternal Energy. In 2007, Innovation Ventures contracted with Krause and K & L Development to design, manufacture, and install equipment to produce and package 5-hour ENERGY at Liquid Manufacturing's bottling plant, and Innovation Ventures contracted with Liquid Manufacturing to house and operate the equipment designed and installed by K & L Development. In 2009, Innovation Ventures and K & L Development reduced their oral agreement to writing (Equipment Manufacturing and Installation Agreement or EMI) and entered into a Nondisclosure and Confidentiality Agreement (Nondisclosure Agreement). Innovation Ventures terminated the EMI in 2010, shortly after it was reduced to writing, and K & L Development ceased business operations sometime in 2010. Also in 2010, Innovation Ventures terminated the manufacturing agreement with Liquid Manufacturing, and Innovation Ventures purchased the equipment Liquid Manufacturing used to produce and package 5-hour ENERGY. In 2011, Innovation Ventures and Liquid Manufacturing memorialized the termination and equipment purchase in a Termination Agreement, which included nondisclosure and noncompete provisions and expressly granted permission to Liquid Manufacturing to manufacture 36 products using the equipment. According to the Termination Agreement, Liquid Manufacturing was obligated to obtain a nondisclosure agreement from each company associated with the production of any of those 36 products. The nondisclosure provision of the Termination Agreement prohibited any of the companies associated with the 36 permitted products from disclosing that its product was bottled using the same equipment as was Innovation Ventures' products. Krause and Paisley sought and received Innovation Ventures' permission

to add Eternal Energy to the list of products Liquid Manufacturing could produce using the equipment. From that time until it repurchased the equipment in 2011, Liquid Manufacturing used Innovation Ventures' equipment to bottle Eternal Energy. In 2012, Innovation Ventures informed Liquid Manufacturing that Liquid Manufacturing had breached the Termination Agreement by producing Eternal Energy and by failing to provide Innovation Ventures with a nondisclosure agreement from Eternal Energy. On the same day it informed Liquid Manufacturing of the breach, Innovation Ventures filed its complaint against defendants, alleging that Liquid Manufacturing, K & L Development, Paisley, and Krause wrongfully shared and used confidential information obtained from Innovation Ventures and that those defendants violated the noncompete agreements by manufacturing, marketing, and distributing Eternal Energy and other energy drinks. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court, Phyllis C. McMillen, J., ultimately granted defendants' motions for summary disposition. The trial court concluded that there was no genuine issue of material fact on the question whether K & L Development and Krause had breached their contract with Innovation Ventures. The court also held that the Nondisclosure Agreement between Innovation Ventures and K & L Development failed for lack of consideration. Alternatively, the court held that the noncompete provision in the Nondisclosure Agreement was unreasonable and, therefore, unenforceable. According to the court, the noncompete provision in the Termination Agreement was also an unreasonable restraint of trade because its purpose was to prevent competition, not to protect a legitimate business interest. The court further held that there was no genuine issue of material fact on the question whether Liquid Manufacturing breached the Termination Agreement because Innovation Ventures gave Liquid Manufacturing permission to produce Eternal Energy. The court held that Liquid Manufacturing did not breach the confidentiality provisions of the Termination Agreement because Liquid Manufacturing had permission to produce 36 different products. In addition, the court concluded that Liquid Manufacturing did not breach the confidentiality provisions of the Termination Agreement because Innovation Ventures failed to take any precautions to prevent Krause and K & L Development from disclosing their knowledge about the bottling equipment housed in Liquid Manufacturing's facilities. Innovation Ventures appealed in the Court of Appeals. The Court, STEPHENS, P.J., and TALBOT and BECKERING, JJ., affirmed the trial court's grant of summary disposition to defendants on all claims. *Innovation Ventures, LLC v Liquid Mfg, LLC*, unpublished opinion per

curiam of the Court of Appeals, issued October 23, 2014 (Docket No. 315519). The Supreme Court granted Innovation Ventures' application for leave to appeal to consider two questions: (1) whether the Nondisclosure Agreement and the EMI are void due to failure of consideration, and (2) whether the noncompete provisions in the Termination Agreement and the Nondisclosure Agreement are reasonable and thus enforceable. 498 Mich 859 (2015).

In a unanimous opinion by Justice MCCORMACK, the Supreme Court *held*:

The EMI and the Nondisclosure Agreement between Innovation Ventures and K & L Development, and Innovation Ventures and Krause, were not void for failure of consideration because the parties exercised their rights as clearly contemplated by the EMI, and the parties had substantially performed their obligations under the contract. Commercial noncompete agreements should be reviewed under the rule of reason with attention to federal cases interpreting the rule; the analysis of noncompete agreements between an employer and an employee does not apply to noncompete agreements between businesses.

1. The Court of Appeals erred by determining that the EMI and the Nondisclosure Agreement were unenforceable because of a failure of consideration. The EMI and the Nondisclosure Agreement between Innovation Ventures and Krause, and Innovation Ventures and K & L Development, were not void for failure of consideration. Failure of consideration is an affirmative defense in cases when a party's performance under a contract is so seriously deficient that the contract is rendered worthless or the inducement ceases to exist. Contracts may be void when there is a failure of consideration, and the parties may be permitted to rescind a contract under those circumstances. The agreements in this case were supported by adequate consideration—that is, much of the work described in the EMI had already been completed at the time the EMI was reduced to writing, and the parties acted in ways contemplated by the EMI and the Nondisclosure Agreement. In fact, Innovation Ventures terminated the EMI by means specified in the EMI.

2. The Court of Appeals erred by applying the standard used to consider the validity of noncompete agreements between an employer and an employee to the noncompete agreements between the parties in this case. Commercial noncompete agreements between businesses should be evaluated under the rule of reason, and federal court interpretations of the rule of reason should be given due deference. The rule of reason considers

whether the restraint of trade resulting from a noncompete agreement regulates and possibly promotes competition, or whether the noncompete agreement suppresses or even destroys competition. To properly evaluate a noncompete agreement under the rule of reason, a court should consider factors including specific information about the relevant business involved in the noncompete agreement, that business's condition before and after the restraint was imposed, the restraint's history, the reason it was adopted, its nature, and its effect.

3. There was no genuine issue of material fact on the question whether Krause or K & L Development breached the parties' agreements regarding the confidentiality of information and the prohibition against competition; that is, no evidence existed to support Innovation Ventures' allegations that Krause and K & L Development breached the confidentiality or the noncompete provisions in the EMI. The prohibition against competing with Innovation Ventures involved the design and production of bottling equipment, not the use of the bottling equipment in this case to manufacture a competing energy drink. Although no genuine issue of material fact existed on the question whether Krause or K & L Development breached the confidentiality or noncompete provisions in the EMI, there were insufficient grounds to reach the same conclusion about K & L Development's alleged breach of the Nondisclosure Agreement. Krause was not individually liable for any alleged violation of the Nondisclosure Agreement because he signed the agreement as the managing member of K & L Development.

4. Innovation Ventures abandoned its claim that Liquid Manufacturing's production of Eternal Energy violated the noncompete provision in the Termination Agreement between Innovation Ventures and Liquid Manufacturing. Innovation Ventures failed to present to the Supreme Court any evidence to support its assertion that Liquid Manufacturing breached the noncompete agreement by producing Eternal Energy. However, there is an issue of material fact about whether Liquid Manufacturing's production of energy drinks other than Eternal Energy violated the noncompete provision in the Termination Agreement.

Reversed in part, affirmed in part, and remanded to the trial court to determine whether the noncompete provisions in the Nondisclosure and Termination Agreements are reasonable under the rule of reason.

1. CONTRACTS — COMMERCIAL NONCOMPETE AGREEMENTS — RULE OF REASON.

Noncompete agreements between businesses should be evaluated under the rule of reason; the rule of reason considers whether the

restraint of trade imposed by a noncompete agreement regulates and possibly promotes competition, or whether the noncompete agreement suppresses or even destroys competition; properly evaluating a noncompete agreement under the rule of reason requires a court to consider specific information about the relevant business involved, the business's condition before and after the restraint of trade became effective, the restraint's history, the reason it was adopted, its nature, and its effect.

2. CONTRACTS — ADEQUATE CONSIDERATION — FAILURE OF CONSIDERATION.

A contract is supported by adequate consideration when there has been substantial performance of the obligations involved in the contract, and the parties' conduct is consonant with conduct anticipated by the contract; failure of consideration is an affirmative defense raised when one party's performance of its obligations under a contract is so seriously deficient that the contract is rendered worthless or the inducement ceases to exist; parties may be permitted to rescind a contract when there is a failure of consideration.

Warner Norcross & Judd LLP (by *John J. Bursch* and *Matthew T. Nelson*) and *The Miller Law Firm, PC* (by *E. Powell Miller*, *Kevin F. O'Shea*, and *Emily H. Hughes*), for plaintiff Innovation Ventures.

Bodman PLC (by *Thomas P. Bruetsch*) for defendants Liquid Manufacturing, LLC, K & L Development of Michigan, LLC, LXR Biotech, LLC, Eternal Energy, LLC, and Andrew Krause.

Peter Paisley *in propria persona*.

Amicus curiae:

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus* and *David R. Russell*), for the Michigan Chamber of Commerce.

MCCORMACK, J. In this case, we consider whether agreements between sophisticated businesses are void for failure of consideration and whether the noncom-

pete provisions in these agreements are reasonable. Plaintiff, Innovation Ventures, LLC, has alleged a variety of tort and breach of contract claims against defendants, Liquid Manufacturing, LLC, K & L Development of Michigan, LLC, Eternal Energy, LLC, LXR Biotech, LLC, Peter Paisley, and Andrew Krause based on the defendants' production of Eternal Energy and other energy drinks.

Contrary to the determination of the Court of Appeals, we conclude that the parties' Equipment Manufacturing and Installation Agreement (EMI) and Nondisclosure Agreement were not void for failure of consideration. We nevertheless affirm the trial court's grant of summary disposition to defendants for the claims against Krause, because there is no genuine issue of material fact on the question whether Krause breached the EMI or the Nondisclosure Agreement. Likewise, there is no genuine issue of material fact on the question whether K & L Development breached the EMI. Because questions of fact remain regarding whether K & L Development breached the Nondisclosure Agreement, however, we vacate the trial court's grant of summary disposition regarding that claim and remand that claim to the trial court for further proceedings consistent with this opinion.

We also hold that a commercial noncompete provision must be evaluated for reasonableness under the rule of reason. We conclude that the Court of Appeals erred when it failed to evaluate under this standard the noncompete provision in the parties' Termination Agreement. We leave undisturbed, however, the Court of Appeals' determination that Liquid Manufacturing did not breach the Termination Agreement by producing Eternal Energy.

Accordingly, we reverse the Court of Appeals in part, affirm in part, and remand to the trial court for consideration of whether the noncompete provisions in the parties' Nondisclosure Agreement and Termination Agreement are reasonable under the rule of reason, whether K & L Development breached the Nondisclosure Agreement, and whether Liquid Manufacturing breached the Termination Agreement with respect to its production of products other than Eternal Energy.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. AGREEMENTS BETWEEN THE PLAINTIFF AND DEFENDANTS K & L DEVELOPMENT AND KRAUSE

In 2007, the plaintiff engaged defendants Andrew Krause and K & L Development of Michigan (K & L Development) to design, manufacture, and install manufacturing and packaging equipment for the production of 5-Hour ENERGY at Liquid Manufacturing's bottling plant.[1] The parties operated under an oral agreement until April 27, 2009, when they memorialized their oral agreement in the written EMI. The EMI recitals referred to the defendants' completed work on the production line installed in Liquid Manufacturing's facility and the plaintiff's desire to engage the defendants in designing, manufacturing, and installing additional manufacturing equipment.[2] The parties' oral agreement did not include a confidentiality agreement or a noncompete provision; the parties added a confidentiality agreement and a noncompete provision

[1] Andrew Krause was the managing member of K & L Development. He is a founding member of Eternal Energy, LLC, and LXR Biotech, LLC, and is the president of LXR Biotech, LLC.

[2] While the EMI and the Nondisclosure Agreement described future work, they were signed after the parties had completed nearly all the work contemplated in the EMI, including the second production line.

when they memorialized their agreement in writing.[3] As provided in the EMI, the parties were permitted to terminate the agreement at any time without cause with 14 days' written notice.

On the same day the EMI was memorialized, the plaintiff and defendant K & L Development entered into an agreement titled Nondisclosure and Confidentiality Agreement (Nondisclosure Agreement).[4] Pursu-

[3] The EMI defined exceptions to confidential information as follows:

> 9.4 Confidential Information does not include (i) information in the public domain; (ii) information legally acquired from a third party not bound to an obligation of confidentiality; (iii) information legally known to Contractor prior to the date hereof; and (iv) information required to be disclosed pursuant to a valid and enforceable subpoena or court order issued by a court of competent jurisdiction.

The EMI also contained the following noncompete provision:

> 10. Exclusivity. During the term of this Agreement and for a period of five years thereafter, within the United States, Canada, Mexico or the EU, Contractor shall not design, manufacture, produce or participate directly or indirectly in the design or manufacture of any product similar to the Equipment with the same or similar purpose of bottling one to four ounce bottles of liquid energy shots. This exclusivity restriction on Contractor is in addition to any and all other restrictions imposed on Contractor pursuant to the applicable copyright laws of the United States and other provisions contained in this Agreement (e.g., paragraph 9. Non-Disclosure of Confidential Information). The Parties specifically acknowledge and agree that this exclusivity provision was fully negotiated at arm's length, and takes into consideration many factors, the result of which was to create reasonable time and geographic limitations, and to clearly define the scope of this provision. The Parties further agree that the terms and provisions of section 9 above, this section 10 and section 11 below . . . constitute binding stipulations of fact for purposes of Michigan Court Rules, Rule 2.116(A)(1) and/or (2).

[4] Andrew Krause signed the Nondisclosure Agreement in his capacity as the managing member of K & L Development. He was not party to the Nondisclosure Agreement in his individual capacity. We leave undisturbed the trial court's finding that Krause was not individually liable under the Nondisclosure Agreement because he was not bound by it.

ant to the Nondisclosure Agreement, K & L Development agreed not to use or disclose information obtained previously, currently, or prospectively through its business relationship with the plaintiff. K & L Development also agreed to obtain a confidentiality agreement from each of its employees.

Shortly after entering the EMI and the Nondisclosure Agreement, the plaintiff terminated the EMI, which was permitted by the EMI's explicit terms with 14 days' notice.[5] K & L Development subsequently stopped engaging in business in 2010.

B. AGREEMENTS BETWEEN THE PLAINTIFF AND LIQUID MANUFACTURING

In March 2007, the plaintiff contracted with defendant Liquid Manufacturing, LLC (Liquid Manufacturing), to produce and package 5-hour ENERGY. The parties subsequently amended this agreement, executing an Amended Manufacturing Agreement, which required Liquid Manufacturing to acquire several pieces of production equipment necessary to bottle 5-hour ENERGY. Liquid Manufacturing owned some of the equipment, and the plaintiff owned the remain-

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The plaintiff argues for the first time in this Court that the Nondisclosure Agreement is a modification of the EMI rather than a separate agreement. We disagree. The plaintiff is correct that in general, "contracts made at [the] same time, between [the] same parties, with reference to [the] same subject matter, are to be construed together." *Savercool v Farwell*, 17 Mich 307, 317 (1868). Despite being signed at the same time, the EMI and the Nondisclosure Agreement were signed by different parties and referred to different subject matter. Moreover, the EMI and the Nondisclosure Agreement each contain integration clauses, limiting the ability of the parties to modify the agreements.

[5] Although the parties dispute when the plaintiff terminated the EMI, there is no dispute that K & L Development and Krause were provided with the requisite 14 days' notice.

der of the equipment. The Amended Manufacturing Agreement also provided the plaintiff with an option to purchase the production equipment acquired and owned by Liquid Manufacturing.

In April 2010, the plaintiff terminated the Amended Manufacturing Agreement with Liquid Manufacturing. The plaintiff, as provided by the Agreement, then exercised its option to purchase the production equipment that Liquid Manufacturing had acquired to manufacture 5-hour ENERGY. The parties memorialized the termination of their business relationship and the plaintiff's purchase of Liquid Manufacturing's production equipment in a new agreement titled Agreement to Terminate and Exercise Purchase Option (Termination Agreement).[6] The Termination Agreement contained several nondisclosure and noncompete provisions, and it also explicitly granted Liquid Manufacturing permission to manufacture 36 Permitted Products using the equipment. As part of the Termination Agreement, Liquid Manufacturing was required to obtain from each company associated with a Permitted Product a nondisclosure agreement stating that the company would not disclose that its product was bottled using the same equipment that had been used to bottle the plaintiff's products. The 36 Permitted Products were identified in the Approved Manufactur-

[6] Defendant Peter Paisley is the President and CEO of Liquid Manufacturing and a founding member of Eternal Energy, LLC, and LXR Biotech, LLC. The Court of Appeals held that Paisley signed the Termination Agreement in his official capacity and was not individually liable under the Agreement. Since the plaintiff has not challenged the Court of Appeals' holding, we do not upset its decision. Paisley is not individually liable because he signed the Agreement in his capacity as a corporate officer. See, e.g., *Wright v Drury Petroleum Corp*, 229 Mich 542, 544-545; 201 NW 484 (1924); *Archbold v Indus Land Co*, 264 Mich 289, 290-291; 249 NW 858 (1933).

er's List, which was appended to the Termination Agreement. The plaintiff's permission to manufacture these products, however, could be revoked if Liquid Manufacturing violated any provision of the Termination Agreement and failed to cure the violation within 30 days.

C. FORMATION OF ETERNAL ENERGY AND LXR BIOTECH

In September 2010, the defendants, Andrew Krause, former managing member of K & L Development, and Peter Paisley, CEO and President of Liquid Manufacturing, formed Eternal Energy, LLC, to produce the energy shot, Eternal Energy. On September 20, 2010, Liquid Manufacturing sought the plaintiff's permission to add Eternal Energy to the Approved Manufacturer's List. On the following day, the plaintiff provided its permission to add Eternal Energy to the Approved Manufacturer's List. Andrew Krause and Peter Paisley then formed LXR Biotech, LLC, to market and distribute Eternal Energy.

From September 2010 until March 2011, Liquid Manufacturing used the plaintiff's equipment to bottle Eternal Energy.[7] Liquid Manufacturing purchased the equipment back from the plaintiff in March 2011 and continued production of Eternal Energy. On January 27, 2012, the plaintiff informed Liquid Manufacturing that it had breached the Termination Agreement by producing Eternal Energy and by failing to provide the plaintiff with the necessary nondisclosure

[7] The Termination Agreement granted Liquid Manufacturing the option to purchase the equipment back from the plaintiff, which it exercised in March 2011. The noncompete provision, which prohibited Liquid Manufacturing from producing non-Permitted Products on the equipment for three years, was not affected by Liquid Manufacturing's purchase of the equipment.

agreement from Eternal Energy, LLC, in which it agreed not to disclose that its product was bottled on the same equipment used to bottle 5-hour ENERGY. The plaintiff demanded that Liquid Manufacturing cease disclosing the plaintiff's confidential information and that it provide the plaintiff with the necessary nondisclosure agreement from Eternal Energy, LLC. Liquid Manufacturing provided the nondisclosure agreement from Eternal Energy, LLC, within the Termination Agreement's prescribed 30-day window to cure any breach.

D. PROCEDURAL HISTORY

On January 27, 2012, the same day that the plaintiff informed Liquid Manufacturing that it had breached the Termination Agreement, the plaintiff instituted the instant action, alleging several tort and breach of contract claims against the defendants. The plaintiff alleged that defendants Liquid Manufacturing, Peter Paisley, K & L Development, and Andrew Krause wrongfully shared and used confidential information and violated their noncompete agreements by manufacturing, marketing, and distributing Eternal Energy and other energy drinks. The plaintiff sought a temporary restraining order to stop Liquid Manufacturing's production of Eternal Energy and sought emergency discovery. The trial court granted the temporary restraining order and the request for emergency discovery, and the court also ordered Liquid Manufacturing to allow the plaintiff to inspect its facility to determine whether it was manufacturing energy shots not approved by the plaintiff or included in the Approved Manufacturer's List. On January 30, 2012, and February 6, 2012, the plaintiff inspected Liquid Manufacturing's facility and discovered evidence that Liquid

Manufacturing had produced Eternal Energy as well as a number of unapproved products.[8] The trial court lifted the temporary restraining order after determining that there was no potential for irreparable harm. The plaintiff subsequently filed an amended complaint alleging additional violations based on the defendants' production of additional energy drinks.

The defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court initially denied the defendants' motion on all claims except the plaintiff's claims against Krause and Paisley of tortious interference. The court also allowed discovery to proceed. After the plaintiff sought additional discovery on third parties, the defendants sought to stay discovery while the trial court ruled on their renewed motions for summary disposition on the remaining claims. The trial court stayed discovery and subsequently granted summary disposition to the defendants on the remaining claims.

Addressing the breach of contract claims against K & L Development and Krause, the trial court held that there was no genuine issue of material fact on the question whether the defendants breached the EMI, because the EMI did not have a noncompete provision preventing direct competition with the plaintiff, and the EMI did not protect information obtained before the EMI was signed. It further held that the Nondisclosure Agreement between the plaintiff and K & L Development failed for lack of consideration. In the alternative, the trial court held that the noncompete provision in the Nondisclosure Agreement was unenforceable because it was unreasonable.

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[8] The plaintiff alleged Liquid Manufacturing was producing E6, Quick Energy, Quencher, 9 Hour Empower, and Perfectly Petite. It is undisputed that these energy drinks were never added to the Approved Manufacturer's List.

The trial court further held that there was no genuine issue of material fact on the question whether Liquid Manufacturing breached the Termination Agreement by producing Eternal Energy. It reasoned that the plaintiff had expressly approved Liquid Manufacturing's production of Eternal Energy and that the only breach alleged—failure to provide the plaintiff with the nondisclosure agreement from Eternal Energy—was timely cured when Liquid Manufacturing provided the plaintiff with Eternal Energy's executed nondisclosure agreement.

The trial court also concluded that Liquid Manufacturing did not breach the confidentiality provisions of the Termination Agreement because the plaintiff allowed Liquid Manufacturing to produce 36 different products using the same equipment used to manufacture 5-hour ENERGY, which effectively waived any confidentiality concerning the manufacturing process. The court reasoned that because the plaintiff authorized the alleged disclosure to Eternal Energy, Liquid Manufacturing could not have breached the agreement by providing information to Eternal Energy, LLC, or LXR Biotech, LLC. The trial court also noted that the plaintiff's claim that Liquid Manufacturing breached the confidentiality provisions of the Termination Agreement could not be sustained because the plaintiff failed to take any precautions to prevent Krause and K & L Development, the *designers* of the equipment, from disclosing their knowledge about the bottling equipment placed in Liquid Manufacturing's facilities. Finally, the trial court held that the noncompete provision in the Termination Agreement between the plaintiff and Liquid Manufacturing was unreasonable, and therefore unenforceable, because the plaintiff did not impose the provision to protect a legitimate business interest. The court reasoned that because the only

intent of the Termination Agreement was to prevent competition, not to prevent an unfair advantage, the agreement was invalid on its face as an unreasonable restraint of trade.

The Court of Appeals affirmed the trial court's grant of summary disposition to defendants on all of the plaintiff's claims. The panel affirmed the trial court's grant of summary disposition of the breach of contract claims against K & L Development on different grounds. The Court further held that the EMI and the Nondisclosure Agreement were unenforceable for a failure of consideration because the plaintiff terminated the parties' business/employment relationship within two weeks of signing the Agreements and without providing K & L Development and Krause what they were promised under the Agreements.

The Court of Appeals also affirmed the trial court's grant of defendants' motions for summary disposition of the breach of contract claims against Liquid Manufacturing and Paisley. Like the trial court, the Court of Appeals reasoned that there was no genuine issue of material fact on the question whether Liquid Manufacturing breached the Termination Agreement by manufacturing Eternal Energy; the plaintiff expressly approved the bottling of Eternal Energy, and Liquid Manufacturing cured its breach of the Termination Agreement by providing the plaintiff with the executed nondisclosure agreement from Eternal Energy, LLC, within the time specified by the Termination Agreement. The Court also affirmed the trial court's grant of summary disposition to Liquid Manufacturing for its production of any product, reasoning that the noncompete provision in the Termination Agreement was unreasonable and, therefore, unenforceable. The Court of Appeals evaluated the reasonableness of the parties'

noncompete provision in the Termination Agreement under the standard governing noncompete provisions between an employer and employee as articulated in *St Clair Med, PC v Borgiel*, 270 Mich App 260, 265; 715 NW2d 914 (2006), and MCL 445.774a. The Court also held that Liquid Manufacturing did not violate the confidentiality agreement provisions in the Termination Agreement because the plaintiff expressly agreed to allow Liquid Manufacturing to produce 36 Permitted Products on the bottling equipment. Although the trial court had not addressed Paisley's personal liability, the Court of Appeals held that Paisley was not personally liable under the Termination Agreement.

We granted leave to consider two questions: (1) whether the parties' Nondisclosure Agreement and EMI are void due to failure of consideration, and (2) whether the noncompete provisions in the Termination Agreement and the Nondisclosure Agreement are enforceable.[9] *Innovation Ventures, LLC v Liquid Mfg, LLC*, 498 Mich 859 (2015).

II. ANALYSIS

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). While the trial court did not state whether it was granting the defendants' motion for summary disposition under MCR 2.116(C)(8) or MCR 2.116(C)(10), we treat its grant of summary disposition as under MCR 2.116(C)(10) because it considered in-

[9] The plaintiff did not appeal the portion of the Court of Appeals' decision affirming the trial court's grant of summary disposition to defendants of the plaintiff's claims of tortious interference with contract and business relations, civil conspiracy, statutory/common-law conversion, fraud in the inducement, and declaratory relief, and therefore we do not address these claims.

formation beyond the pleadings. "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden*, 461 Mich at 120. When evaluating a motion for summary disposition under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

We review de novo, as a question of law, the proper interpretation of a contract. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014). "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). When interpreting a contract, our primary obligation "is to give effect to the parties' intention at the time they entered into the contract." *Miller-Davis Co*, 495 Mich at 174. To do so, we examine "the language of the contract according to its plain and ordinary meaning." *Id*. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written . . . ." *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Reasonableness of a noncompete agreement is inherently fact-specific, see, e.g., *Woodward v Cadillac Overall Supply Co*, 396 Mich 379, 391; 240 NW2d 710 (1976), but "[t]he reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 506; 741 NW2d 539 (2007); see also *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 408; 362 NW2d 676

(1984) ("The courts thus must scrutinize such agreements and enforce them only to the extent they are reasonable.").

A. CONSIDERATION

We turn first to the Court of Appeals' determination that the EMI and the Nondisclosure Agreement were unenforceable for failure of consideration. "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). "To have consideration there must be a bargained-for exchange"; "[t]here must be a benefit on one side, or a detriment suffered, or service done on the other." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (quotation marks and citation omitted). Generally, courts do not inquire into the sufficiency of consideration: "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Id*. at 239 (quotation marks and citation omitted; alteration in original).

As an initial matter, the trial court did not make any findings about a failure of consideration, but instead held that the EMI and the Nondisclosure Agreement were not supported by valid consideration. We disagree; both the EMI and the Nondisclosure Agreement were supported by sufficient consideration. According to the EMI, Krause and K & L Development were to design, manufacture, and assemble production equipment for the plaintiff to place in Liquid Manufacturing's facility. Once the manufacturing line placed in Liquid Manufacturing's facility was functioning properly, Krause and K & L Development were to install a

second line in the plaintiff's Indiana facility according to the specifications outlined by the plaintiff. In exchange, the plaintiff was to pay Krause and K & L Development in installments proportionate to the value of their work. In fact, at the time the parties memorialized their oral agreement in the EMI, much of the work contemplated in the EMI had already been completed by Krause and K & L Development. Similarly, there was sufficient consideration to support the Nondisclosure Agreement between the plaintiff and K & L Development. In exchange for the plaintiff's acknowledgment that K & L Development wished to continue doing business with the plaintiff, K & L Development agreed to the confidentiality and noncompete agreements contained in the Nondisclosure Agreement.

In contrast to a lack of consideration, which relates to the adequacy of consideration at the time of the contract's formation, failure of consideration relates to the parties' performance under the contract. Failure of consideration is "[a] seriously deficient contractual performance that causes a contract's basis or inducement to cease to exist or to become worthless." *Black's Law Dictionary* (10th ed). In general, failure of consideration is an affirmative defense, and the party asserting it bears the burden of proof. See MCR 2.111(F)(3).

While we have had few opportunities to address this doctrine, generally we have recognized a failure of consideration when one party has committed a first, substantial breach of a contract and sought to maintain an action against the other party for a subsequent failure to perform. See, e.g., *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 573; 127 NW2d 340 (1964); *Kunzie v Nibbelink*, 199 Mich 308, 315-316; 165 NW

722 (1917).[10] "[W]hen there is a failure to perform a substantial part of the contract or one of its essential items," the courts have permitted the parties to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933). But failure of consideration does not void a contract when the party seeks to void the contract based on an event explicitly anticipated in the contract. See, e.g., *Abbate v Shelden Land Co*, 303 Mich 657, 665-666; 7 NW2d 97 (1942).

We disagree with the Court of Appeals' holding that the EMI and the Nondisclosure Agreement were void for a failure of consideration. The EMI and the Nondisclosure Agreement were not void for a failure of consideration because the parties exercised their rights as plainly contemplated by the contract.[11] To the extent that the EMI and the Nondisclosure Agreement contemplated an ongoing business relationship, the

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[10] For example, in *Sharrar v Wayne Sav Ass'n*, 246 Mich 225; 224 NW 379 (1929), we held that when subscription fees were collected in exchange for the establishment of a local branch, the failure to establish the local branch would constitute a failure of consideration. We noted that when "the establishment of the branch constituted a controlling inducement for the subscription," failure to establish the branch, in breach of the agreement, was a substantial failure of consideration. *Id*. at 229.

Similarly, in *Gottesman v Rheinfrank*, 303 Mich 153; 5 NW2d 701 (1942), we held that when a contractor failed to fulfill a promise to remedy defects in a house constructed by the contractor, the purchaser could rescind the contract for failure of consideration.

[11] In fact, much of the work contemplated in the agreements had already been completed. It is unclear from the record whether the plaintiff paid K & L Development and Krause for their services. But it is ultimately irrelevant to our analysis. Given that K & L Development and Krause already completed a significant amount of the work contemplated in the agreements, any claim that the plaintiff failed to pay would be properly brought as a breach of contract claim, rather than as a failure of consideration defense. See, e.g., Restatement Contracts, 2d, § 235.

EMI also contemplated the termination of the Agreement with 14 days' notice, at any time, without cause. A party seeking to void a contract on the basis of an event anticipated by the contract cannot claim failure of consideration. See *id*. Because the plaintiff acted within the rights explicitly provided by the contract, the defendants may not now claim failure of consideration.[12] Accordingly, we reverse the portion of the Court of Appeals' opinion holding that the EMI and the Nondisclosure Agreement were void for failure of consideration.

B. RULE OF REASON

We turn next to the Court of Appeals' analysis of the noncompete provision in the parties' Termination Agreement. The plaintiff contends that the Court of Appeals applied the wrong standard to determine

[12] The Court of Appeals' reliance on *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6; 708 NW2d 778 (2005), and several extra-jurisdictional authorities to conclude that terminating a business relationship shortly after entering an agreement resulted in a failure of consideration was erroneous. In *Adell Broadcasting*, the Court of Appeals held that the defendants' breach of contract claim was the appropriate vehicle, not failure of consideration, when the parties' business relationship continued, but the plaintiff failed to pay the defendants' outstanding commissions. *Id*. at 14. And the extra-jurisdictional authorities cited by the Court of Appeals are distinguishable because each case involved at-will employment relationships, not contracts between sophisticated business entities as in this case. See, e.g., *Summits 7, Inc v Kelly*, 178 Vt 396, 405; 886 A2d 365 (2005) (holding that continued employment is sufficient consideration to support a restrictive covenant not to compete entered after at-will employment has started); *Brown & Brown, Inc v Mudron*, 379 Ill App 3d 724, 729; 887 NE2d 437 (2008) (holding that a restrictive covenant not to compete will not be enforced against an at-will employee unless the employee has continued employment for a substantial period of time). We decline to address in this case whether failure of consideration applies to at-will employees who sign a noncompete agreement after at-will employment has started.

whether the noncompete provision was unreasonable. We agree. The Court of Appeals erred by applying the standard articulated in MCL 445.774a, which is the proper framework to evaluate the reasonableness of noncompete agreements between employees and employers. Instead, the Court should have applied the rule of reason to evaluate the parties' noncompete agreement.

The Michigan Antitrust Reform Act (MARA) governs the contracts at issue in this case. MCL 445.771 *et seq*.[13] MCL 445.772, which governs general agreements, provides that "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."[14] This statutory language is interpreted in light of the long tradition of holding "that a contract would not be construed as in restraint of trade unless the restraint was unreasonable." *Staebler-Kempf Oil Co v Mac's Auto Mart, Inc*, 329 Mich 351, 356-357; 45 NW2d 316 (1951), citing *Standard Oil Co of New Jersey v United States*, 221 US 1; 31 S Ct 502; 55 L Ed 619 (1911); *People ex rel Attorney General v Detroit Asphalt Paving Co*, 244 Mich 119; 221 NW 122 (1928).

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[13] MARA was enacted by 1984 PA 274, effective March 29, 1985, in an effort to create uniformity in antitrust legislation among the states. MARA was patterned after the Uniform State Antitrust Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1973. See MCLA 445.771 *et seq*., Michigan prefatory note, and MCLS 445.771 *et seq*., Michigan prefatory note. See also *Compton v Joseph Lepak, DDS, PC*, 154 Mich App 360, 366 n 2; 397 NW2d 311 (1986).

[14] MCL 445.772 is the corollary to § 1 of the Sherman Antitrust Act. See 15 USC 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

The only statutory guidance MARA provides for assessing the reasonableness of a noncompete provision is contained in MCL 445.774a. MCL 445.774a sets forth the factors a court must consider to assess whether a noncompete agreement between an employer and an employee is reasonable.[15] MCL 445.774a; see also *Rory v Continental Ins Co*, 473 Mich 457, 475 n 32; 703 NW2d 23 (2005). MCL 445.774a does not address the proper framework for evaluating a noncompete agreement between businesses. The Court of Appeals relied on *St Clair Med*, 270 Mich App 260, and *Coates*, 276 Mich App 498, two cases involving noncompete agreements between employers and their employees, to hold that the noncompete provision in the Termination Agreement in this case should be evaluated under the same factors identified in MCL 445.774a.[16] Neither case, therefore, is instructive here. But while MARA does not address the standard for evaluating a noncompete agreement between two business entities, the statute provides general guidance about where courts should look in the absence of

[15] MCL 445.774a provides in relevant part:

> (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

[16] Because the Court of Appeals held that the EMI and the Nondisclosure Agreement were void for failure of consideration, it did not review the trial court's holding that the noncompete provision in the Nondisclosure Agreement was unreasonable and, therefore, unenforceable.

specific rules. MCL 445.784(2) instructs courts to look to federal interpretation of comparable statutes:

> It is the intent of the [L]egislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason.

In general, federal courts have assessed noncompete agreements between two commercial entities under the rule of reason.[17] See, e.g., *Perceptron, Inc v Sensor Adaptive Machines, Inc*, 221 F3d 913, 919 (CA 6, 2000) ("The legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason.") (quotation marks and citation omitted); *County Materials Corp v Allan Block Corp*, 502 F3d 730, 735 (CA 7, 2007) (holding that a noncompete agreement between two companies was required to be evaluated under the rule of reason). When applying the rule of reason, a court must "tak[e] into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co v Khan*, 522 US 3, 10; 118 S Ct 275; 139 L Ed 2d 199 (1997). The rule of reason has been articulated as

> whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily con-

[17] Similarly, while this Court has not addressed this question since MARA was enacted, before that time we regularly evaluated commercial noncompete agreements under the rule of reason. See, e.g., *Staebler-Kempf Oil Co*, 329 Mich at 357 (holding that a noncompete provision in a deed to sell a retail gasoline station was reasonable under the rule of reason); *Hubbard v Miller*, 27 Mich 15, 19-20 (1873) (holding that a contract restraining trade should be evaluated under the rule of reason).

> sider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. *Bd of Trade of City of Chicago v United States*, 246 US 231, 238; 38 S Ct 242; 62 L Ed 683 (1918).

We conclude that the parties' noncompete agreements should have been evaluated under the rule of reason.[18]

1. BREACH OF CONTRACT CLAIMS AGAINST K & L DEVELOPMENT AND KRAUSE

Because we hold that the EMI and the Nondisclosure Agreement were not void for failure of consideration, we must determine whether K & L Development and Krause violated the noncompete and confidentiality provisions in the EMI, whether K & L Development violated the noncompete and confidentiality provisions

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[18] In *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478; 650 NW2d 670 (2002), the Court of Appeals held that the rule of reason should be used to evaluate a noncompete agreement between a business and independent contractors. The Court of Appeals properly identified and reasoned that MCL 445.772 codified the rule of reason, despite failing to refer to MCL 445.784(2) or to evaluate whether federal courts applied the rule of reason under comparable statutes. *Id*. at 492, 497-498.

While the Court of Appeals did not evaluate the reasonableness of the noncompete provision in the Nondisclosure Agreement, the trial court held that the noncompete provision was unenforceable. We vacate that holding and remand to the trial court to consider whether the noncompete provisions in the Nondisclosure Agreement and the Termination Agreement were reasonable under the proper standard.

in the Nondisclosure Agreement, and whether the noncompete provision in the Nondisclosure Agreement is a reasonable restraint of trade. We affirm the trial court's grant of summary disposition of the plaintiff's breach of contract claims against Krause without evaluating the reasonableness of the noncompete provision in the EMI because there is no genuine issue of material fact on the question whether Krause breached the confidentiality and nondisclosure provisions contained in the EMI. With respect to the breach of contract claims against K & L Development, we affirm the trial court's grant of summary disposition regarding any alleged breaches of the EMI, but we remand to the trial court the claim that K & L Development breached the Nondisclosure Agreement because we cannot say, as a matter of law, that K & L Development did not breach the Nondisclosure Agreement.

We first address the confidentiality and noncompete provisions in the EMI between the plaintiff and K & L Development and the plaintiff and Krause. The plaintiff alleges that K & L Development and Krause violated the EMI by sharing confidential information with Eternal Energy, LLC, and by producing Eternal Energy. While the Court of Appeals did not address whether K & L Development and Krause breached the parties' agreements, the trial court held that there was no genuine issue of material fact on the question whether Krause breached the EMI. We affirm the trial court's reasoning and hold that the same reasoning applies to K & L Development's liability under the EMI. The EMI defined confidential information as information obtained by the parties after the execution of the EMI. Because the EMI explicitly excluded from its definition of confidential information any information obtained by K & L Development and Krause *before* the execution of the EMI, K & L Development and

Krause may only be liable for violating the EMI with regard to information obtained *after* the execution of the EMI and shared with Eternal Energy, LLC. There is no allegation that Krause or K & L Development obtained confidential information after April 27, 2009, the date the EMI was executed.

Similarly, the noncompete provision in the EMI only prohibited K & L Development and Krause from designing and producing bottling equipment. It did not prohibit the parties from producing a competing energy drink. There is no evidence in the record that K & L Development or Krause designed or produced bottling equipment in violation of the EMI's noncompete provision. Instead, the plaintiff premises its allegations against K & L Development and Krause entirely on their production of Eternal Energy on the equipment that they designed, produced, and installed in Liquid Manufacturing's facility. But using that equipment to produce a competing energy drink did not constitute a violation of the noncompete provision. Accordingly, there is no genuine issue of material fact on the question whether K & L Development and Krause breached either the confidentiality or the noncompete provisions in the EMI.

While defendants argue that they are entitled to a ruling as a matter of law that K & L Development did not breach the Nondisclosure Agreement, there are insufficient grounds for this Court to conclude that no genuine issue of material fact exists on that question.[19] K & L Development allegedly stopped operating in mid-2010, but it is unclear from the record precisely

[19] As noted earlier, Krause only signed the Nondisclosure Agreement in his capacity as a managing member of K & L Development. We do not disturb the trial court's finding that Krause is not individually liable under the Nondisclosure Agreement.

when K & L Development stopped conducting business. The plaintiff has alleged that K & L Development breached the Nondisclosure Agreement by producing Eternal Energy beginning in September 2010, but it is possible that K & L Development was no longer operating after the formation of Eternal Energy, LLC. If that is the case, K & L Development could not have breached the Nondisclosure Agreement by producing Eternal Energy or by sharing any confidential information with Eternal Energy. Nevertheless, given the lack of complete discovery in this case, we cannot say that no genuine issue of material fact exists on that question, and we remand this matter to the trial court for further proceedings consistent with this opinion.

2. BREACH OF CONTRACT CLAIMS AGAINST LIQUID MANUFACTURING

While the Court of Appeals erred by not evaluating the noncompete provision in the Termination Agreement under the rule of reason, it is unnecessary to evaluate whether the noncompete provision is reasonable with respect to Liquid Manufacturing's production of Eternal Energy because the plaintiff has abandoned any claim that Liquid Manufacturing breached the Termination Agreement by producing Eternal Energy. Although the plaintiff made these claims in both the trial court and the Court of Appeals, the plaintiff failed to present to this Court any argument on these breach issues, opting instead to make conclusory statements in its application for leave to appeal and in its briefs to this Court. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v*

Taylor, 457 Mich 232, 243; 557 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 88-89; 869 NW2d 213 (2015). The defendants even highlighted the plaintiff's failure to seek leave to appeal on these issues in their response to the plaintiff's application by noting that the plaintiff had abandoned this claim.[20] Despite having an opportunity to rebut this claim in its reply brief, plaintiff remained silent. Irrespective of the merits of the claim, we do not address it because any argument that Liquid Manufacturing breached the Termination Agreement with respect to Eternal Energy has been abandoned. We thus leave undisturbed the Court of Appeals' holding affirming summary disposition of these claims.

There is, however, a genuine issue of material fact regarding whether Liquid Manufacturing breached the Termination Agreement by producing other products. Accordingly, we remand to the trial court the plaintiff's claim that Liquid Manufacturing breached the Termination Agreement with respect to its production of other energy drinks. The trial court should consider whether the noncompete provision in the Termination Agreement is reasonable under the rule of reason and whether Liquid Manufacturing violated the Termination Agreement by producing energy drinks other than Eternal Energy.[21]

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[20] In their answer to the plaintiff's application for leave, the defendants argued, "Plaintiff has abandoned all other issues and claims. Thus, the Court of Appeals should be affirmed as to summary disposition of Plaintiff's other claims, including alleged breaches of the confidentiality provisions of the agreements among the parties, tortious interference, conspiracy, unjust enrichment, conversion, and fraud."

[21] The Court of Appeals also held that the plaintiff abandoned any claim that the noncompete provision could be reformed in a manner that would be reasonable. Because we remand to the trial court to determine

III. CONCLUSION

We conclude that the parties' EMI and Nondisclosure Agreement were not void for failure of consideration. The agreements were supported by sufficient consideration and sufficient performance to render them enforceable. We also conclude that commercial noncompete agreements should be evaluated under the rule of reason. Because there is no genuine issue of material fact on the question whether defendants Krause and K & L Development breached the EMI, or that defendant Krause breached the Nondisclosure Agreement, we affirm the trial court's grant of summary disposition to the defendants on these claims. We leave undisturbed the Court of Appeals' holding that defendant Liquid Manufacturing did not breach the Termination Agreement by producing Eternal Energy.

We remand, however, the remaining claims to the trial court to consider whether the noncompete provisions in the parties' Nondisclosure Agreement and Termination Agreement are reasonable under the proper standard, whether K & L Development breached the Nondisclosure Agreement, and whether Liquid Manufacturing violated the Termination Agreement by producing products other than Eternal Energy.

YOUNG, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MCCORMACK, J.

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whether the noncompete provision is reasonable, the plaintiff may raise any claims that the noncompete provision may be reformed in a manner to make it reasonable.

ARBUCKLE v GENERAL MOTORS LLC

Docket No. 151277. Argued on application for leave to appeal May 4, 2016. Decided July 15, 2016.

Clifton M. Arbuckle sustained a work-related back injury while working for General Motors Corporation, now General Motors LLC (GM), and in May 1993 began receiving a disability pension. He retired that month and was subsequently awarded workers' compensation benefits relating to his disability. Later, he also received Social Security Disability Insurance (SSDI) benefits. GM and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), had executed a letter of agreement in 1990 in which GM agreed not to coordinate workers' compensation and disability pension benefits for its employees under MCL 418.354, which generally requires reduction of workers' compensation benefits by coordination with disability pension benefits. This letter of agreement was incorporated into the 1990 collective-bargaining agreement (CBA) between GM and the UAW and was intended to remain in place until termination or amendment of the CBA, which expired in November 1993. When the CBA expired, however, the provision against coordination was continued in subsequent letters of agreement and incorporated into subsequent CBAs. In 2009, GM and the UAW adopted a formula (incorporated into the 2009 CBA) by which GM would coordinate benefits, using disability pension benefits to reduce the amount of workers' compensation benefits for all workers and retirees, regardless of when they had retired. GM advised Arbuckle that effective January 1, 2010, his benefits would be reduced using the formula in the 2009 agreement. Arbuckle requested a hearing before the director of the Workers' Compensation Agency, who ultimately concluded that GM was improperly using Arbuckle's SSDI benefits to offset his workers' compensation benefits in violation of MCL 418.354(11). A workers' compensation magistrate reversed the director's ruling but nevertheless concluded that GM was prohibited from reducing Arbuckle's workers' compensation benefits by his disability pension benefits because Arbuckle had never agreed to coordination of benefits and no evidence established that the UAW had the authority to bargain on Arbuckle's behalf after his retirement.

The Michigan Compensation Appellate Commission (MCAC) reversed in part, holding that, irrespective of the UAW's authority to bind retirees, GM was permitted to coordinate Arbuckle's disability pension benefits. Arbuckle sought leave to appeal, but after the Court of Appeals granted his application, he died. Robert Arbuckle, the personal representative of the estate, was substituted as plaintiff. The Court of Appeals, STEPHENS, P.J., and HOEKSTRA and METER, JJ., reversed in an unpublished opinion per curiam, issued February 10, 2015 (Docket No. 310611), and remanded the case for further proceedings. GM sought leave to appeal. In lieu of granting leave to appeal, the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 498 Mich 956 (2015).

In a unanimous opinion by Justice LARSEN, the Supreme Court *held*:

GM may coordinate Arbuckle's disability pension benefits because the parties' collective-bargaining agreements and the subsequent modifications to them did not vest Arbuckle's right to uncoordinated benefits.

1. A threshold question was whether Arbuckle's claim of entitlement to uncoordinated workers' compensation benefits was actually a claim under § 301 of the Labor Management Relations Act, PL 80-101, § 301; 61 Stat 136, 156; 29 USC § 185(a), and therefore preempted by federal law. While § 301 gives federal courts jurisdiction over controversies involving CBAs, state courts have concurrent jurisdiction over them. Section 301, however, nonetheless preempts state substantive law. State courts must apply federal law in deciding those claims because only federal law governs the interpretation and application of CBAs. Accordingly, it was necessary to decide whether this case was properly characterized as a claim subject to the preemptive force of § 301. Preemption under § 301 occurs when a decision on the state claim is inextricably intertwined with consideration of the terms of the labor contract and when application of state law to a dispute requires the interpretation of a CBA. A two-part test is used to determine whether § 301 preemption applies. The court must first examine whether proof of the state-law claim requires interpretation of the terms of a CBA and, second, ascertain whether the right claimed by the plaintiff was created by the CBA or state law. If application of the test reveals a right that both arises from state law and does not require contract interpretation, there is no preemption, but if a state-law claim fails either of these two requirements, it is preempted by § 301.

2. Arbuckle framed his claim as enforcement of a right to workers' compensation benefits arising under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The WDCA provides that an employer's obligation to pay weekly workers' compensation benefits must be reduced by other wage-replacement benefits. Therefore, the coordination of benefits is mandatory under the WDCA, subject to certain limitations. The relevant limitation in this case is found in MCL 418.354(14), which provides that mandatory coordination does not apply to any payments received or to be received under a disability pension plan provided by the same employer that was in existence on March 31, 1982. Any disability pension plan entered into or renewed after that date, however, may provide that payments will not be coordinated under MCL 418.354. Accordingly, benefits under disability pension plans begun or renewed after March 31, 1982, are subject to coordination by virtue of the statute, but an employer may elect against exercising its right to coordinate benefits, such as when it enters into an employment agreement exempting benefits from coordination. Determining whether GM was authorized to coordinate Arbuckle's workers' compensation benefits with his disability pension benefits required interpretation of the 1990 agreement and the 1990 CBA as well as the parties' subsequent agreements permitting benefit coordination, which were incorporated into the subsequent CBAs. Because resolution of the underlying coordination claim required the interpretation of a CBA, Arbuckle's claim failed the first prong of the preemption test and was, therefore, preempted by § 301.

3. The 2009 agreement, incorporated into the 2009 CBA, permitted coordination of those benefits for all retirees who retired before January 1, 2010, regardless of their date of retirement or injury, while the 1990 agreement, in effect when Arbuckle retired, did not permit coordination. Central to the determination of which agreement controlled was whether the 1990 agreement provided vested or nonvested benefits to Arbuckle. Under federal law, a union may represent and bargain for already-retired employees, but only with respect to nonvested benefits. By contrast, when an employer explicitly obligates itself to provide vested benefits, that promise is rendered forever unalterable without the retiree's consent. The intent of the parties and the specific language of the CBA at issue control whether a benefit vests, and a right to uncoordinated benefits that is subject to an express durational limit does not vest.

4. The Court of Appeals erred by holding that GM lacked the authority to coordinate Arbuckle's benefits under the 2009 CBA. The 1990 agreement extended uncoordinated benefits only until termination or earlier amendment of the 1990 CBA, which expired on November 15, 1993. Every subsequent agreement that likewise prohibited coordination included an express durational limitation like that contained in the 1990 agreement, representing GM's continued commitment to refrain from coordinating benefits only until termination or earlier amendment of each subsequent agreement. Under the terms of the 1990 agreement and the 1990 CBA, Arbuckle's right to uncoordinated benefits was subject to modification and thus was not a vested right. Nothing in the 1990 CBA itself, or the subsequent modifications of it, demonstrated a commitment by GM to provide Arbuckle an unalterable right to uncoordinated benefits that would survive termination of the agreement.

Reversed; MCAC's order reinstated.

LABOR LAW — LABOR MANAGEMENT RELATIONS ACT — SECTION 301 — STATE-LAW CLAIMS — PREEMPTION — COLLECTIVE-BARGAINING AGREEMENTS.

Section 301 of the Labor Management Relations Act, PL 80-101, § 301; 61 Stat 136, 156; 29 USC § 185(a), gives federal courts jurisdiction over controversies involving collective-bargaining agreements (CBAs), but state courts have concurrent jurisdiction over them; § 301 preempts state substantive law, however, so state courts must apply federal law in deciding claims involving CBAs; preemption occurs when a decision on the state claim is inextricably intertwined with consideration of the terms of the labor contract and when application of state law to a dispute requires the interpretation of a CBA; a two-part test is used to determine whether § 301 preemption applies: the court must first examine whether proof of the state-law claim requires interpretation of the terms of a CBA and, second, ascertain whether the right claimed by the plaintiff was created by the CBA or state law; if application of the test reveals a right that both arises from state law and does not require contract interpretation, there is no preemption, but if a state-law claim fails either of those requirements, it is preempted by § 301.

MacDonald & MacDonald PLLC (by *Robert J. MacDonald)* for Robert Arbuckle.

Ogletree, Deakins, Nash, Smoak & Stewart, PLLC (by *Gregory M. Krause*), and *Kim F. Ebert*, pro hac vice, for General Motors, LLC.

Amicus Curiae:

Donald M. Fulkerson and *Adler Stillman, PLLC* (by *Barry Adler*), for the Michigan Association for Justice.

LARSEN, J. In this case, we consider whether MCL 418.354 of the Worker's Disability Compensation Act (WDCA)[1] permits coordination of plaintiff's workers' compensation benefits with his disability pension benefits in light of postretirement changes made to plaintiff's pension plan as a result of collective bargaining. Applying federal substantive law to the facts of this case, we hold that defendant may coordinate plaintiff's disability pension benefits because the parties' collective-bargaining agreements and the subsequent modifications thereto did not vest plaintiff's right to uncoordinated benefits.[2] We therefore reverse the judgment of the Court of Appeals and reinstate the order of the Michigan Compensation Appellate Commission, which allowed coordination.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff, Clifton Arbuckle,[3] began working for defendant, General Motors LLC, in July 1969; he retired in May 1993. On June 20, 1991, plaintiff sustained a work-related back injury and, effective May 1, 1993, began receiving a total and permanent disability pension from defendant. Following his retirement later that month, plaintiff filed a petition seeking workers' compensation benefits for his work-related disability.

[1] MCL 418.101 *et seq*.

[2] See *M&G Polymers USA, LLC v Tackett*, 574 US ___, ___; 135 S Ct 926, 937; 190 L Ed 2d 809 (2015).

[3] Because Robert Arbuckle is pursuing this appeal as personal representative of the estate of the late Clifton Arbuckle, who died during the appeal, "plaintiff" refers to Clifton Arbuckle.

In February 1995, a magistrate found plaintiff partially disabled and granted him an open award of benefits at a fixed rate of $362.78 a week until further order of the Workers' Compensation Agency. Sometime after he began receiving workers' compensation benefits, plaintiff also began receiving Social Security Disability Insurance (SSDI) benefits.

After discovering that many employers were paying more than once to compensate a disabled employee's lost earning potential when that employee was also receiving disability pension benefits, the Legislature, in 1981, enacted MCL 418.354.[4] The statute permits an employer to reduce its obligation to pay an employee's weekly workers' compensation benefits by coordinating those benefits with that employee's disability pension benefits. Although the statute makes coordination mandatory by default,[5] MCL 418.354(14) permits an employer to elect *not* to coordinate disability pension benefits in certain circumstances, such as when it negotiates an employment agreement that provides otherwise.

In this case, defendant and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),[6] executed a letter of agreement in 1990 (the 1990 Letter of Agreement), pursuant to which defendant agreed not to coordinate statutory workers' compensation benefits with contractual disability pension benefits for its employees. This letter of agreement was incorporated into the then-existing 1990 collective-bargaining agreement (CBA) between defendant and the UAW, constituting an

[4] 1981 PA 203, effective March 31, 1982.

[5] *Smitter v Thornapple Twp*, 494 Mich 121, 138; 833 NW2d 875 (2013).

[6] There is no dispute that the UAW represented plaintiff at all times during his employment.

amendment of the 1990 pension plan under which plaintiff would eventually retire. The 1990 Letter of Agreement provided that the prohibition against benefit coordination was to continue "until termination or earlier amendment of the 1990 Collective Bargaining Agreement," which expired on November 15, 1993.

Between 1990 and 2003, defendant and the UAW negotiated new CBAs at three- or four-year intervals. Each CBA replaced its predecessor and was accompanied by a letter of agreement that replicated the provisions against benefit coordination set forth in the 1990 Letter of Agreement.[7] Things changed, however, in September 2007, when defendant and the UAW agreed to a formula by which defendant would use disability pension benefits to reduce workers' compensation benefits. As a result of this agreement (the 2007 Letter of Agreement), which was simultaneously incorporated into the then-existing 2007 CBA, workers' compensation benefits and disability pension benefits were to be coordinated, but only "for employees who are injured and retire on or after October 1, 2007 . . . ."[8] (Underlining omitted.) In other words, the 2007 Letter of Agreement lifted the prohibition against coordination with respect to future retirees but did not affect those like

[7] Plaintiff received the benefit of each of these subsequent agreements, even those occurring postretirement.

[8] The 2007 Letter of Agreement explained this new formula in the following terms:

> Pursuant to Subsection 354(14) of the Michigan Workers Compensation Act [MCL 418.354(14)], as amended, until termination or earlier amendment of the 2007 Collective Bargaining Agreement for employees who are injured and retire on or after October 1, 2007, workers' compensation payments for such employees shall be reduced by disability retirement benefits payable under the Hourly-Rate Employees Pension Plan to the extent that the combined workers' compensation payments, initial Social Security Disability Insurance Benefit Amount, and the initial disability retirement benefit (per week) exceed the employee's gross Average Weekly Wage at the time of the injury.

plaintiff, who had already retired.[9] Like its predecessors, the 2007 Letter of Agreement expressly stipulated that the agreement against coordination would continue "until termination or earlier amendment of the 2007 Collective Bargaining Agreement . . . ."

In 2009, because of the severe economic downturn and defendant's impending bankruptcy, defendant and the UAW revisited their 2007 Letter of Agreement and agreed to amend its terms to encompass a larger pool of retirees. As a result of this agreement (the 2009 Letter of Agreement), which was again simultaneously incorporated into the then-existing 2009 CBA, defendant and the UAW agreed that "*all* retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury" would be subject to benefit coordination consistent with the 2007 formula.[10]

On November 16, 2009, defendant advised plaintiff by letter that effective January 1, 2010, his benefits would be partially reduced pursuant to the formula set forth in the 2007 Letter of Agreement. Given plaintiff's

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[9] The 2007 Letter of Agreement did not completely coordinate future retirees' benefits. Rather, a retiree's workers' compensation benefits were reduced only "to the extent that" the retiree's workers' compensation payments, SSDI benefits, and disability pension benefits collectively exceeded the retiree's average weekly wage at the time of his injury. In such a case, the retiree's workers' compensation benefits would be reduced by the lesser of the disability pension benefits or the amount of the disability pension benefits in excess of the average weekly wage. In short, a retiree who was subject to coordination under the new formula would, at least, still receive payments from defendant equal to his earnings before the injury that resulted in the disability benefits.

[10] Emphasis added. The 2009 Letter of Agreement provided as follows:

> As a result of the 2009 negotiations, the parties have agreed that the 2007 letter agreement, referenced above, will be amended such that, effective January 1, 2010, the provisions of the 2007 letter agreement will be applied to all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury.

weekly benefit award, his initial SSDI benefit, his disability pension benefit, and his average weekly wage at the time of his injury, the letter indicated that plaintiff's coordinated weekly workers' compensation rate would be $264.96. Plaintiff received a nearly identical letter on January 19, 2010, the only material difference being that his weekly workers' compensation rate was reduced to $262.55.

Following coordination of his benefits, plaintiff requested a hearing before the director of the Workers' Compensation Agency, who found that defendant was improperly using plaintiff's SSDI benefits to offset his workers' compensation benefits in violation of MCL 418.354(11).[11] A workers' compensation magistrate reversed the director's MCL 418.354(11) ruling but nevertheless concluded that, under *Murphy v City of Pontiac*,[12] defendant was prohibited from reducing plaintiff's workers' compensation benefits by his disability pension benefits because plaintiff had never agreed to coordination and there was no evidence establishing that the UAW had the authority to bargain on behalf of plaintiff following his retirement.

The Michigan Compensation Appellate Commission (MCAC) affirmed the magistrate's ruling on MCL 418.354(11) but reversed the judgment, holding that regardless of the UAW's authority to bind retirees, defendant was permitted to coordinate plaintiff's disability pension benefits under *Murphy*. Alternatively, the MCAC held that coordination was proper because any right plaintiff had to uncoordinated benefits as part of the 1990 Letter of Agreement and the 1990 CBA

[11] This provision prohibits the use of SSDI benefits to reduce weekly workers' compensation benefits unless there has been an amendment of the federal Social Security Act.

[12] *Murphy v City of Pontiac*, 221 Mich App 639; 561 NW2d 882 (1997).

had expired effective November 15, 1993. After granting plaintiff's application for leave to appeal, the Court of Appeals reversed the decision of the MCAC and remanded the case for further proceedings.[13]

On appeal in this Court, defendant contended that the Court of Appeals erred by denying defendant its right to coordinate benefits because, under the express terms of the 1990 Letter of Agreement and the 1990 CBA, its agreement not to coordinate employees' workers' compensation benefits with their pension disability benefits expired on November 15, 1993. Because the 2009 Letter of Agreement thereafter permitted coordination of those benefits for those "who retired prior to January 1, 2010, regardless of their date of retirement or injury," defendant argued that coordination was proper under MCL 418.354(14).[14]

Plaintiff responded that as a retiree, he is no longer an active member of the UAW and, therefore, is not covered by the 2009 Letter of Agreement in which defendant and the UAW agreed that coordination was permissible. In the absence of any evidence that the UAW possessed the authority to bind plaintiff to agreements occurring after his retirement, plaintiff argued that the prohibition against coordination to which he did agree as part of the 1990 Letter of Agreement and the 1990 CBA remains in effect.[15]

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[13] *Arbuckle v Gen Motors LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2015 (Docket No. 310611).

[14] Defendant also argued that the lower tribunals and this Court lack jurisdiction over this case because it involves the interpretation of a CBA and is thus completely preempted by federal law. However, for reasons that will be explained in further detail, we have jurisdiction over the instant dispute, and, therefore, defendant is not entitled to dismissal for lack of state court jurisdiction.

[15] Plaintiff also claimed that defendant's coordination-of-benefits formula illegally "considered" plaintiff's SSDI benefits to reduce his workers' compensation benefits in violation of MCL 418.354(11), which, as

In lieu of granting defendant's application for leave to appeal, we ordered oral argument on whether to grant the application or take other action,[16] directing the parties to file supplemental briefs addressing the following two issues: "(1) whether the plaintiff's action is preempted by federal law, and (2) whether the plaintiff's action is governed by state law or federal law."[17]

II. STANDARD OF REVIEW

Although judicial review of a decision by the MCAC is limited, questions of law in a workers' compensation case, including the proper interpretation of a statute, are reviewed de novo.[18] Interpretation of a collective-bargaining agreement, like interpretation of any other contract,[19] is also a question of law also subject to review de novo.[20] A reviewing court interprets a

previously indicated, requires employers to "consider[]" a retiree's SSDI benefits as "payments from funds provided by the employer and to be primary payments on the employer's obligation . . . as old-age benefit payments under the social security act are considered" in MCL 418.354(1)(a), but only if the Social Security Act has been amended in a particular way. In other words, MCL 418.354(11) limits an employer's ability to use, i.e., coordinate, SSDI benefits to satisfy its obligation to pay workers' compensation benefits. Because the parties do not dispute that no such amendment to the Social Security Act has occurred, plaintiff asserted that defendant is statutorily forbidden from coordinating his SSDI benefits.

We decline to consider this question because plaintiff failed to adequately brief and argue the issue in this Court, thereby abandoning it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[16] See MCR 7.305(H)(1).

[17] *Arbuckle v Gen Motors, LLC*, 498 Mich 956 (2015).

[18] *Smitter*, 494 Mich at 129.

[19] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

[20] *Maurer v Joy Technologies, Inc*, 212 F3d 907, 914 (CA 6, 2000).

collective-bargaining agreement "according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy."[21]

III. ANALYSIS

A threshold question is whether plaintiff's claim of entitlement to uncoordinated workers' compensation benefits is actually a claim under § 301 of the federal Labor Management Relations Act (LMRA)[22] and is, therefore, preempted by federal law. As part of this inquiry, we must determine whether we, as a state court, have jurisdiction to decide the merits of this case and, if so, whether state or federal law controls. In resolving these separate yet interrelated questions, it is helpful to review the relevant principles of federal preemption law.

A. PREEMPTION, JURISDICTION, AND CHOICE OF LAW

When considering a federal statute's preemptive effect, the United States Supreme Court has instructed that "[t]he purpose of Congress is the ultimate touchstone" in every preemption case.[23] Congress may indicate its preemptive intent in two ways: "explicitly . . . in a statute's language" or, by implication, through a statute's "structure and purpose."[24] Section 301(a) of the LMRA states, in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any

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[21] *M&G Polymers*, 574 US at ___; 135 S Ct at 933.

[22] PL 80-101, § 301; 61 Stat 136, 156; 29 USC § 185(a).

[23] *Retail Clerks Int'l Ass'n v Schermerhorn*, 375 US 96, 103; 84 S Ct 219; 11 L Ed 2d 179 (1963).

[24] *Jones v Rath Packing Co*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed 2d 604 (1977).

> district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[25]

Although this statute does not contain an express preemption clause, the United States Supreme Court has concluded that § 301 impliedly preempts certain state-law causes of action involving labor contracts. The Court has explained that

> § 301 is a potent source of federal labor law, for though state courts have concurrent jurisdiction over controversies involving collective-bargaining agreements, *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 [82 S Ct 519; 7 L Ed 2d 483] (1962), state courts must apply federal law in deciding those claims, *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 [82 S Ct 571; 7 L Ed 2d 593] (1962), and indeed any state-law cause of action for violation of collective-bargaining agreements is entirely displaced by federal law under § 301, see *Avco Corp.* v. *Machinists*, 390 U. S. 557 [88 S Ct 1235; 20 L Ed 2d 126] (1968). State law is thus "pre-empted" by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements.[26]

Thus, while § 301 clearly "provides the federal courts with jurisdiction over controversies involving collective-bargaining agreements,"[27] and even allows defendants to remove certain disputes to federal court,[28] it is equally clear that state courts have concurrent jurisdiction over those disputes.[29] Defendant

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[25] 29 USC 185(a).

[26] *United Steelworkers of America v Rawson*, 495 US 362, 368; 110 S Ct 1904; 109 L Ed 2d 362 (1990).

[27] *Id*.

[28] *Avco Corp v Aero Lodge No 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 US 557, 560; 88 S Ct 1235; 20 L Ed 2d 126 (1968).

[29] *United Steelworkers*, 495 US at 368.

has not attempted to remove this case to federal court; we therefore have jurisdiction regardless of whether plaintiff's claim is properly characterized as a claim under § 301 of the LMRA.

That we have jurisdiction over the instant dispute does not, however, end our threshold inquiry. Although state courts have concurrent jurisdiction over controversies involving collective-bargaining agreements, § 301 preempts state substantive law. "[S]tate courts must apply federal law in deciding those claims" because "only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements."[30]

We must, therefore, decide whether this case is properly characterized as a claim subject to the preemptive force of § 301. Preemption under § 301 "occurs when a decision on the state claim 'is inextricably intertwined with consideration of the terms of the labor contract and when application of state law to a dispute "requires the interpretation of a collective bargaining agreement." ' "[31] While "a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law," other state-law claims could still involve "the meaning or scope of a term in a contract suit . . . ."[32] Those claims are likewise preempted by federal labor law.[33]

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[30] *Id*.

[31] *Jones v Gen Motors Corp*, 939 F2d 380, 382 (CA 6, 1991) (citations omitted).

[32] *Allis-Chalmers Corp v Lueck*, 471 US 202, 210; 105 S Ct 1904; 85 L Ed 2d 206 (1985).

[33] *Id*. See also *Jones*, 939 F2d at 384 ("[T]he pre-emptive effect of § 301 applies to state-law claims that do not facially allege a breach of [the CBA].").

The United States Court of Appeals for the Sixth Circuit has adopted a two-part test for determining whether § 301 preemption applies. The court first "examine[s] whether proof of the state law claim requires interpretation of collective bargaining agreement terms" and second, "ascertain[s] whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law."[34] If application of this test reveals a right that both arises from state law and does not require contract interpretation, then there is no preemption.[35] However, "if a state-law claim fails *either* of these two requirements, it is preempted by § 301."[36]

In this case, we are faced with a claim framed as enforcement of a right to workers' compensation benefits arising under Michigan's workers' compensation statute. While defendant argues that resolution of the coordination issue requires the interpretation of the 1990 Letter of Agreement and the 1990 CBA, as well as various postretirement changes made to plaintiff's pension plan through collective bargaining, plaintiff contends that his claim can be resolved in its entirety by resorting only to the Michigan workers' compensation statutes, the WDCA.

The WDCA provides that an employer's obligation to pay weekly workers' compensation benefits "shall be reduced"[37] by other wage-replacement benefits.[38] Thus, as we have held, "[t]he coordination of benefits is mandatory" under the WDCA, subject to certain limi-

[34] *Alongi v Ford Motor Co*, 386 F3d 716, 724 (CA 6, 2004).

[35] *Id*.

[36] *Mattis v Massman*, 355 F3d 902, 906 (CA 6, 2004).

[37] MCL 418.354(1).

[38] See MCL 418.354(1)(a) through (f).

tations.[39] The relevant limitation in this case is found in MCL 418.354(14), which provides as follows:

> This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer, which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section.

Accordingly, benefits under disability pension plans begun or renewed after March 31, 1982, are subject to coordination by virtue of the statute, but an employer may elect against exercising its right to coordinate benefits, such as when it enters into an employment agreement exempting benefits from coordination.

Consistently with MCL 418.354(14), defendant relies on its 2009 Letter of Agreement with the UAW to permit benefit coordination following the expiration of the 1990 Letter of Agreement. In order to determine whether defendant was authorized to coordinate plaintiff's workers' compensation benefits with his disability pension benefits, then, we must necessarily interpret the 1990 Letter of Agreement and the 1990 CBA as well as the parties' subsequent agreements permitting benefit coordination, which were incorporated into the then-existing CBAs. Because resolution of the underlying coordination claim requires the interpretation of the terms of a collective-bargaining agreement, plaintiff's claim fails the first prong of the Sixth Circuit's preemption test. Plaintiff's claim is, therefore, preempted by § 301.

Plaintiff cannot avoid the preemptive force of § 301 by arguing that only defendant's *defense* of coordina-

[39] *Smitter*, 494 Mich at 138.

tion depended on interpretation of the CBA, whereas proof of plaintiff's claims does not.[40] Resolution of

[40] Plaintiff relies heavily on a federal case involving similarly situated General Motors (GM) disability retirees who challenged the coordination of their workers' compensation and disability pension benefits. See *Savage v Gen Motors*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 21, 2010 (Case No. 10-12372). At issue in *Savage* was whether the doctrine of complete preemption would permit the defendant to remove the plaintiffs' claims for uncoordinated workers' compensation benefits to federal court. *Id*. at 3. The Eastern District did not permit removal. The court concluded that defendant had raised the breach of the collective-bargaining agreement as a *defense* to the plaintiffs' primary claims to enforce orders awarding each of them workers' compensation benefits under Michigan's workers' compensation statutes. *Id*. at 4. Accordingly, it granted the plaintiffs' motion to remand the case to state court. The court reasoned:

> [P]roof of Plaintiffs' claim does not require the interpretation of the CBA, nor is Plaintiffs' claim a breach of contract claim in disguise. Plaintiffs are seeking to enforce a right to receive workers' compensation benefits, which is created by state statute, not the CBA. Although GM attempts to characterize Plaintiffs' claim as a "right to non-coordination" under the CBA, Plaintiffs' claim is for benefits under the statute. *Plaintiffs* are not asserting a "right to non-coordination"; rather, *GM* is seeking to justify *its* right to coordinate benefits under the CBA. Accordingly, the court finds that Plaintiffs' state law claims are not preempted by § 301. [*Id*. at 5 (alteration in original).]

In this case, defendant has not sought removal to federal court. Nonetheless, its contention that federal law governs the instant case depends on whether § 301 of the LMRA preempts plaintiff's claim. We are not bound by the decision of the federal district court, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), and plaintiff has not claimed that the federal court's judgment has any preclusive effect. We respectfully disagree with the federal district court's characterization of the parties' collective-bargaining agreement and the Michigan workers' compensation statutes.

Coordination of benefits is mandatory under the WDCA *unless* a statutorily authorized exception to coordination applies. *Smitter*, 494 Mich at 138. MCL 418.354(14) permits, but does not require, employers to forego coordination as the result of a collectively bargained agreement. Thus, any right plaintiff had to *un*coordinated benefits arose

plaintiff's state-law workers' compensation claim " 'is inextricably intertwined with consideration of the terms of the labor contract' " because application of MCL 418.354(14) to the instant dispute " 'requires the interpretation of [the relevant] collective-bargaining agreement.' "[41] Accordingly, this suit must proceed as a case controlled by federal, rather than state, substantive law, and the Court of Appeals erred by failing to recognize that.

B. APPLICATION OF FEDERAL SUBSTANTIVE LAW

As previously indicated, coordination of benefits under the WDCA is "mandatory."[42] MCL 418.354(14), however, permits the parties to a collective-bargaining agreement to decline to coordinate an employee's workers' compensation benefits with his or her disability pension benefits. In this case, plaintiff does not dispute that the text of the 2009 Letter of Agreement, as incorporated into the then-existing 2009 CBA, permits coordination of those benefits for "all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury," while the 1990 Letter of Agreement, in effect when plaintiff retired, did not permit such coordination. The issue, then, is which agreement controls.

Central to this determination is whether the 1990

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exclusively as the result of the CBA, not by force of the Michigan statute. Had there never been a CBA, the WDCA would have required coordination. Therefore, the workers' compensation order that plaintiff seeks to enforce "itself is a creature wholly begotten by the CBA." *Jones*, 939 F2d at 383. Plaintiff's claim is, thus, " 'inextricably intertwined with consideration of the terms of the labor contract' and . . . 'requires the interpretation of a collective-bargaining agreement.' " *Id*. at 382 (citations omitted).

[41] *Id*. (citations omitted).

[42] *Smitter*, 494 Mich at 138.

Letter of Agreement provided vested or nonvested benefits to plaintiff. Under federal law, a union may represent and bargain for already-retired employees, but only with respect to *non*vested benefits.[43] By contrast, when an employer explicitly obligates itself to provide vested benefits, that promise is rendered forever unalterable without the retiree's consent.[44] We must, therefore, consider whether the 1990 Letter of Agreement vested a right in plaintiff to uncoordinated benefits that the 2009 Letter of Agreement could not alter.

In *Garbinski v Gen Motors LLC*,[45] the Sixth Circuit considered whether a letter agreement, containing language identical to that at issue here, created a vested right to uncoordinated workers' compensation benefits. Noting that the intent of the parties and the specific language of the CBA at issue control whether a benefit vests, the Sixth Circuit held that the right to uncoordinated benefits had not vested because it was subject to an express durational limit.[46] Indeed, as in the agreement before us, "the clause placing limits on the right was in the *very same sentence* as the right it created . . . ."[47] It, thus, clearly informed persons covered by the agreement that "the right was subject to modification."[48] The agreement, therefore, did not cre-

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[43] See *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 171 n 11, 181 n 20; 92 S Ct 383; 30 L Ed 2d 341 (1971). See also *Int'l Brotherhood of Electrical Workers v Citizens Telecom Co of California*, 549 F3d 781, 786-788 (CA 9, 2008); *United Steelworkers of America v Canron, Inc*, 580 F2d 77, 80-81 (CA 3, 1978); *Maytag Corp v UAW*, 687 F3d 1076, 1085 (CA 8, 2012); *Pierce v Security Trust Life Ins Co*, 979 F2d 23, 30 (CA 4, 1992); *American Federation of Grain Millers v Int'l Multifoods Corp*, 116 F3d 976, 979 (CA 2, 1997).

[44] *Allied Chem*, 404 US at 181-182 & n 20.

[45] *Garbinski v Gen Motors LLC*, 521 Fed Appx 549, 552-553 (CA 6, 2013).

[46] *Id*. at 556-557.

[47] *Id*. at 557.

[48] *Id*.

ate vested rights.[49]

Garbinski's persuasive force was only enhanced by the later decision of the United States Supreme Court in *M&G Polymers USA, LLC v Tackett*.[50] In *M&G Polymers*, the United States Supreme Court disapproved prior Sixth Circuit caselaw, which it characterized as "placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."[51] Those decisions,[52] the Supreme Court explained, "distort the text of [a collective-bargaining] agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties."[53] Indeed, basic principles of contract interpretation instruct that "courts should not construe ambiguous writings to create lifetime promises"[54] and, absent a contrary intent, that " 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.' "[55] For "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."[56]

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[49] See *id*. at 556. See also *Sprague v Gen Motors Corp*, 133 F3d 388, 400-401 (CA 6, 1998) (en banc) (refusing to infer an employer's lifetime commitment to vest healthcare benefits to retirees from silence and ambiguous language in a contract that was not collectively bargained).

[50] *M&G Polymers*, 574 US ___; 135 S Ct 926.

[51] *Id*. at ___; 135 S Ct at 935.

[52] See, e.g., *UAW v Yard-Man, Inc*, 716 F2d 1476 (CA 6, 1983), overruled by *M&G Polymers*, 574 US at ___; 135 S Ct at 937.

[53] *M&G Polymers*, 574 US at ___; 135 S Ct at 936.

[54] *Id*. at ___; 135 S Ct at 936.

[55] *Id*. at ___; 135 S Ct at 937, quoting *Litton Fin Printing Div v NLRB*, 501 US 190, 207; 111 S Ct 2215; 115 L Ed 2d 177 (1991).

[56] *M&G Polymers*, 574 US at ___; 135 S Ct at 937. See also *Gallo v Moen Inc*, 813 F3d 265, 269, 271 (CA 6, 2016) (stating that "we should not expect to find lifetime commitments in time-limited agreements" and that "[i]f [*M&G Polymers*] tells us anything, however, it is that the

These principles govern here. Far from being "silent as to the duration of retiree benefits," the agreement here clearly extended those benefits only "until termination or earlier amendment of the 1990 Collective Bargaining Agreement," which expired on November 15, 1993. Every agreement subsequent to the 1990 Letter of Agreement, which likewise prohibited coordination, included an express durational limitation identical to that contained in the 1990 Letter of Agreement, representing defendant's continued commitment to refrain from coordinating benefits only "until termination or earlier amendment" of each of those subsequent agreements. By confining plaintiff's right to uncoordinated benefits to a specific period of time, the parties plainly intended to reserve the power to modify the policy regarding coordination at some point in the future. As a result, under the terms of the 1990 Letter of Agreement and the 1990 CBA, plaintiff's right to uncoordinated benefits was subject to modification and was thus a nonvested right.[57] The various letters of

use of the future tense without more—without words committing to retain the benefit for life—does not guarantee lifetime benefits"), citing *M&G Polymers*, 574 US at ___; 135 S Ct at 937. See also *Bland v Fiatallis North America, Inc*, 401 F3d 779, 784 (CA 7, 2005) ("Upon vesting, benefits become forever unalterable, and because employers are not legally required to vest benefits, the intention to vest must be found in 'clear and express language' in plan documents."), citing *Inter-Modal Rail Employees Ass'n v Atchison, T & SF R Co*, 520 US 510, 515; 117 S Ct 1513; 137 L Ed 2d 763 (1997); *Vallone v CNA Fin Corp*, 375 F3d 623, 632 (CA 7, 2004) (stating that "a modification that purports to vest welfare benefits must be contained in the plan documents and must be stated in clear and express language"); *Sengpiel v BF Goodrich Co*, 156 F3d 660, 667 (CA 6, 1998) (stating that the intent to vest must be found in the plan documents and stated in clear and express language); *UAW v Skinner Engine Co*, 188 F3d 130, 139 (CA 3, 1999) (stating that an employer's commitment to vest welfare-plan benefits must not be inferred lightly and must be stated in clear and express language).

[57] Plaintiff also maintains that in order to establish its right to coordination, defendant must provide "clear and unmistakable evi-

agreement that were executed following plaintiff's retirement, together with the express durational clause set forth under the 1990 Letter of Agreement and the 1990 CBA that were in place at the time of plaintiff's retirement, guaranteed that plaintiff would receive uncoordinated benefits only until the agreement terminated or was amended, nothing more.[58] Because nothing in the 1990 CBA itself, or the subsequent modifications thereto, demonstrates a commitment by

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dence" that plaintiff intended to waive his state-law right to uncoordinated workers' compensation benefits on the basis of the postretirement amendments of the 1990 CBA. See *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 409 n 9; 108 S Ct 1877; 100 L Ed 2d 410 (1988). Plaintiff's reliance on *Lingle* is misplaced. *Lingle* spoke of "clear and unmistakable" evidence as being necessary to overcome an Illinois law prohibiting the parties to a collective-bargaining agreement from altering a worker's rights under the state worker's compensation scheme. See *id*. No such law exists in Michigan. Indeed, the only basis for plaintiff's entitlement to uncoordinated workers' compensation benefits was the 1990 Letter of Agreement and the 1990 CBA, which were authorized under MCL 418.354(14) but did not create a vested right to uncoordinated workers' compensation benefits. Accordingly, there was nothing for plaintiff to waive.

[58] The Court of Appeals and plaintiff placed particular emphasis on the deposition testimony of Elizabeth LaMarra, defendant's manager of life insurance and disability plans, who testified that "there is only one pension plan" and further agreed with the statement that "employe[es] that retire under different contracts have different entitlements based on when they retired . . . ." According to the Court of Appeals and plaintiff, this testimony demonstrates that in the absence of any new agreement with plaintiff explicitly reserving for defendant the right to unilaterally modify the agreement under which plaintiff retired, coordination of plaintiff's benefits was not permissible.

First, this analysis fails to recognize that nonvested rights may be modified absent an unequivocal agreement to the contrary. Accordingly, that plaintiff was entitled to uncoordinated benefits at his retirement did not indefinitely prohibit defendant from entering into a subsequent agreement permitting benefit coordination when there was no agreement to that effect. Second, the fact that the attendant letters of agreement modified a single, continuous pension plan has no bearing on the coordination issue because the 1990 Letter of Agreement and the

defendant to provide plaintiff an unalterable right to uncoordinated benefits that would survive termination of the agreement, the Court of Appeals erred by holding that defendant lacked the authority to coordinate plaintiff's benefits under the 2009 CBA.

IV. CONCLUSION

In lieu of granting defendant's application for leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the MCAC's order allowing defendant to coordinate plaintiff's workers' compensation benefits with his disability pension benefits. Neither the 1990 Letter of Agreement along with the 1990 CBA nor any subsequent agreements created an unalterable right to uncoordinated benefits for life. They instead evinced the parties' intent to reserve the power to amend plaintiff's right to uncoordinated benefits on termination or earlier amendment of the agreements. Under a proper reading of the relevant agreements and the application of federal substantive law, defendant's subsequent coordination of plaintiff's workers' compensation benefits with his disability pension benefits did not violate the terms of plaintiff's disability pension plan, nor did it violate MCL 418.354.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with LARSEN, J.

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letters of agreement thereafter correspond to the respective CBAs, *not* the pension plan. Thus, plaintiff's and the Court of Appeals' reliance on this testimony is misplaced.

RONNISCH CONSTRUCTION GROUP, INC v
LOFTS ON THE NINE, LLC

Docket No. 150029. Argued November 5, 2015 (Calendar No. 4). Decided July 26, 2016.

Ronnisch Construction Group, Inc. (Ronnisch) brought an action in the Oakland Circuit Court against Lofts on the Nine, LLC (LOTN) and others, alleging breach of contract and unjust enrichment and seeking foreclosure of a lien. The contract between Ronnisch and LOTN involved the construction of a condominium building in Ferndale, Michigan, and required that any claim arising out of or related to the contract be submitted to arbitration. Because of a deficiency in payment, Ronnisch had filed a claim of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq*., with the Oakland County Register of Deeds. The parties agreed to a stay of the proceedings in the circuit court and proceeded with arbitration, during which LOTN asserted claims of its own related to faulty or incomplete work. The arbitrator awarded damages to both Ronnisch and LOTN, resulting in a net award to Ronnisch. LOTN paid Ronnisch the net award amount plus interest. Ronnisch then moved the circuit court for confirmation of the arbitration award and sought attorney fees and costs under MCL 570.1118(2) of the CLA. LOTN argued that Ronnisch's motion should be denied because LOTN had already satisfied the arbitration award by paying Ronnisch and that no attorney fees were warranted because once Ronnisch's breach-of-contract claim had been satisfied, its lien foreclosure claim became moot. The circuit court, Shalina Kumar, J., denied Ronnisch's motion. With respect to attorney fees, the circuit court held that because LOTN had paid Ronnisch the amount owed under the arbitration award and neither the circuit court nor the arbitrator had adjudicated Ronnisch's lien foreclosure claim, Ronnisch was not a prevailing lien claimant and the circuit court did not have discretion to award Ronnisch attorney fees and costs under the CLA. Ronnisch appealed. The Court of Appeals, JANSEN, P.J., and SAAD and DONOFRIO, JJ., vacated that portion of the circuit court order concerning attorney fees and remanded the case, determining that Ronnisch was a prevailing party under the CLA and that the circuit court had discretion to award Ronnisch

attorney fees. 306 Mich App 203 (2014). The Supreme Court granted LOTN's application for leave to appeal. 497 Mich 1003 (2015).

In an opinion by Justice VIVIANO, joined by Justices MARKMAN, MCCORMACK, and BERNSTEIN, the Supreme Court *held*:

MCL 570.1118(2) of the CLA provides that in an action to enforce a construction lien through foreclosure, the court may allow reasonable attorney fees to a lien claimant who is the prevailing party. A party may be awarded reasonable attorney fees if it prevails in arbitration on a related contract claim brought in the same action as its lien foreclosure claim and if it was a lien claimant under the CLA when it became the prevailing party. In this case, the circuit court had discretion to award attorney fees to Ronnisch because Ronnisch was a lien claimant who prevailed in an action to enforce a construction lien through foreclosure.

1. Under MCL 570.1118(2), in an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorney fees to a lien claimant who is the prevailing party. MCL 570.1105(2) defines "lien claimant" as a person having a right to a construction lien under the CLA. Ronnisch had a valid claim of lien that attached to LOTN's interest in the property. Further, it is undisputed that LOTN did not tender full payment to Ronnisch on the contract amount before the arbitration award. Therefore, when Ronnisch received its arbitration award, it was a lien claimant because it possessed a right to a construction lien under the CLA. The fact that Ronnisch was not determined to be a lien claimant before the arbitration award was not dispositive. Instead, the material inquiry was whether Ronnisch, as the party seeking fees, was a lien claimant under the CLA when it became the prevailing party by virtue of the arbitration award in its favor.

2. The plain language of MCL 570.1118(2) does not expressly limit the trial court's ability to award attorney fees to a lien claimant who is the prevailing party on the lien claim. Rather, reading the statute as a whole makes clear that a lien claimant who is the prevailing party may seek attorney fees in an action to enforce a construction lien through foreclosure. In MCL 570.1118(2), the phrase "action to enforce a construction lien through foreclosure" refers to a civil judicial proceeding in which foreclosure of a construction lien is sought, and it is comprised of all the claims asserted in the action, including any related claim

for breach of contract. By beginning with the phrase "[i]n an action to enforce a construction lien through foreclosure," MCL 570.118(2) establishes that the focus is on whether the lien claimant is a prevailing party in the action (i.e., the entirety of the judicial proceeding) in which the lien foreclosure claim was asserted. There is no indication from the language of MCL 570.1118(2) that the lien claimant must receive a judgment on its foreclosure claim for it to be the prevailing party. The Legislature directed the trial court to examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant. Consistently with this directive, a lien claimant in such an action might prevail on its related breach of contract claim and receive the entire amount to which it is entitled under its lien claim. Under Michigan law, a lien foreclosure claim and a claim for breach of the underlying contract are integrally related. A contract is a necessary prerequisite to a construction lien. A construction lien stems from the underlying contract, and its amount is determined by the contract's terms. These principles are reflected throughout the CLA. In essence, the lien is but a means for enforcing the payment of the debt arising from the performance of the contract. A party may proceed to enforce its lien through foreclosure while simultaneously seeking recovery based on the contract from which the lien arose. But there can only be one satisfaction. Thus, a lien foreclosure claim and a claim for breach of the underlying contract are integrally related, and allowing a party to pursue both merely gives the party a better chance of recovering what it is owed.

3. A "prevailing party" is the party to a suit who successfully prosecutes the action, prevailing on the main issue, even though not necessarily to the extent of the party's original contention. The prevailing party is the one in whose favor the decision or verdict is rendered and judgment entered. For there to be a prevailing party, there must have been a material and enforceable alteration of the legal relationship of the parties resulting from judicial imprimatur. In this case, Ronnisch received an award on its contract claim pursuant to a final and binding arbitration. This award constituted a conclusive determination of the rights and obligations of the parties. That is, the arbitration produced an enforceable award that altered the legal relationship of the parties. Moreover, through the arbitration award, Ronnisch prevailed on the main issue in the action, i.e., it obtained an enforceable award compensating it for its labor and materials. Under the CLA, a lien claimant becomes the prevailing party when the rights and obligations of the parties that are at the heart of its lien claim are conclusively determined in its favor.

Ronnisch's contract and lien foreclosure claims both sought to obtain payment for the labor and materials supplied by Ronnisch, and both claims necessarily required determinations to be made regarding the parties' rights and obligations stemming from the underlying contract. By prevailing on one of those claims—the contract claim—Ronnisch successfully prosecuted the action, receiving the requisite conclusive determination and thereby prevailing on its main issue.

4. That the circuit court never entered a judgment confirming the arbitration award did not preclude the Michigan Supreme Court from determining that Ronnisch was the prevailing party. The lack of judicial imprimatur in Ronnisch's favor was a direct result of the circuit court's failure to confirm Ronnisch's arbitration award upon its motion. Contrary to the circuit court's conclusion, LOTN's payment of the arbitration award did not obviate the need to confirm the award. In certain circumstances, confirmation may be necessary even if the award has been satisfied, as in the instant case, when a party seeks attorney fees. A party cannot avoid confirmation by paying an arbitration award before the confirmation proceeding. Therefore, LOTN's payment of the arbitration award should not have precluded the circuit court from providing the necessary judicial imprimatur in this case by confirming the award. Ronnisch was entitled to seek attorney fees under the CLA because it prevailed on the main issue in its construction lien action when it received a favorable arbitration award on its contract claim. The arbitration award constituted a conclusive and enforceable determination of the rights and obligations of the parties that were at the heart of Ronnisch's lien claim. Therefore, Ronnisch was the prevailing party in its action to enforce a construction lien through foreclosure.

Affirmed. Case remanded to the circuit court for further proceedings.

Chief Justice YOUNG, joined by Justices ZAHRA and LARSEN, dissenting, concluded that recovery of attorney fees under the CLA is permitted only to those parties who prevail on a construction lien. Under MCL 570.1118(2), the court may allow reasonable attorney fees to a lien claimant who is the prevailing party. The term "lien claimant" is statutorily defined as a person having a right to a construction lien under the CLA. Grammatically, this requires that the claimant have a present, not a previous or theoretical, right to a lien at the time the claimant is the prevailing party. Additionally, MCL 570.1107(1) states that a lien cannot exceed the amount of the lien claimant's contract less

payments made on the contract. In this case, the circuit court determined that Ronnisch had prevailed only on its contract claim, not its lien foreclosure claim. Ronnisch received and accepted full payment for all its damages incurred under the contract. By doing so, Ronnisch extinguished any claimed lien. The majority opinion simply fails to acknowledge that Ronnisch was never more than a presumptive lien claimant that extinguished its lien before the validity of its lien claim was ever determined. Before the acceptance of the payment, there had never been any determination that Ronnisch was a valid lien claimant—that is, whether Ronnisch had a right to a construction lien. And after Ronnisch accepted the payment, there was no more debt on which any lien could be based. Accordingly, when Ronnisch moved in the circuit court for an award of attorney fees, it was no longer a person having a right to a construction lien under the CLA. The effect of the majority's construction of the CLA is to undercut the lien foreclosure statutory process and attorney fees remedy entirely to permit the recovery of attorney fees based on a simple common-law contract claim. It is doubtful that the Legislature created an unnecessary lien foreclosure process with the intention of establishing a new route to recover attorney fees for an existing common-law contract claim. In purporting to construe the CLA, the majority has converted a statutory attorney fees remedy requiring prevailing on a lien foreclosure action into one in which prevailing on the main issue of the lawsuit is sufficient, but there is no textual support for an attorney fees remedy under the CLA by prevailing on the main issue. Because Ronnisch did not meet the statutory definition of "lien claimant" under the CLA, and because it voluntarily extinguished its lien claim before the circuit court could have determined that it was a lien claimant, Ronnisch was not entitled to attorney fees, and Chief Justice YOUNG would have reversed the Court of Appeals on that issue.

LIENS — CONSTRUCTION LIENS — PREVAILING PARTIES — ATTORNEY FEES — ARBITRATION AWARDS.

MCL 570.1118(2) of the Construction Lien Act (CLA) provides that in an action to enforce a construction lien through foreclosure, the court may allow reasonable attorney fees to a lien claimant who is the prevailing party; a party may be awarded reasonable attorney fees if it prevails in arbitration on a related contract claim brought in the same action as its lien foreclosure claim and if it was a lien claimant under the CLA when it became the prevailing party.

Deneweth, Dugan & Parfitt, PC (by *Ronald A. Deneweth* and *Mark D. Sassak*), for Ronnisch Construction Group, Inc.

Seyburn Kahn, PC (by *Ronald L. Cornell, Jr.*, *David F. Hansma*, and *Jonathan H. Schwartz*), for Lofts on the Nine, LLC.

VIVIANO, J. At issue in this case is whether plaintiff, Ronnisch Construction Group, Inc. (RCG), can seek attorney fees under § 118(2), MCL 570.1118(2), of the Construction Lien Act (CLA) from defendant Lofts on the Nine, LLC (LOTN),[1] given that plaintiff received a favorable arbitration award on its related breach of contract claim but did not obtain a judgment on its construction lien claim. We hold that the trial court may award attorney fees to RCG because RCG was a lien claimant who prevailed in an action to enforce a construction lien through foreclosure. Therefore, we affirm the judgment of the Court of Appeals and remand to the trial court for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On May 25, 2007, RCG entered into a construction contract with LOTN to construct a condominium building. RCG last provided labor and materials on April 24, 2009. LOTN withheld payment of a portion of the contract amount, maintaining that RCG breached the contract by providing defective construction, dishonestly charging LOTN, and failing to complete the project on time. On June 2, 2009, RCG recorded its Claim of

[1] MCL 570.1101 *et seq*. Before enactment of the CLA in 1980, its predecessor, the Mechanics' Lien Act, former MCL 570.1 *et seq*., governed construction liens in Michigan.

Lien, claiming a construction lien in the amount of $626,163.73, subject to interest on late payments in accordance with the contract. RCG also filed a notice of lis pendens against the subject property.

On November 25, 2009, RCG filed this suit against LOTN, seeking foreclosure of the lien and raising claims for breach of contract and unjust enrichment.[2] RCG sought a judgment in the amount of $626,163.73, together with interest, costs, and attorney fees. However, the parties agreed to stay the proceedings to pursue contractually mandated arbitration. Following arbitration, the arbitrator awarded $636,058.72 to RCG and awarded $185,238.36 to LOTN on its recoupment defense and counterclaims, resulting in a net award of $450,820.36 in RCG's favor. The arbitrator did not address RCG's claim for attorney fees and costs and instead reserved the issue for the trial court.

A few weeks later, LOTN paid the arbitration award in full. Thereafter, RCG filed a motion requesting that the trial court lift the stay of proceedings, confirm the arbitration award, and award RCG its actual attorney fees and costs under § 118(2). The trial court denied RCG's motion, determining that RCG's lien foreclosure claim had not been adjudicated by the arbitrator or the trial court and that RCG's lien was satisfied when it voluntarily accepted LOTN's tender of payment. Thus, the trial court held that RCG was not a prevailing lien claimant under the CLA, a necessary predicate to the recovery of attorney fees under § 118(2), and that the court therefore did not have the discretion to award attorney fees to RCG.

On appeal, the Court of Appeals vacated the portion of the trial court's order denying RCG's request for attorney fees and remanded for further

[2] RCG's unjust enrichment claim is not at issue in this appeal.

proceedings.[3] The Court of Appeals held that, having brought both a contract claim and a foreclosure of lien claim, the fact that RCG "substantially prevail[ed] on the amounts it sought under the claim of lien made it a prevailing party" under the CLA.[4] The Court of Appeals also distinguished this Court's order in *H A Smith Lumber & Hardware Co v Decina*,[5] noting that, unlike the instant case, the subcontractors in *Decina* did not prevail on their lien claims because their liens could not legally attach to the property.[6] Accordingly, the Court of Appeals concluded that the trial court had discretion under § 118(2) to award attorney fees.[7]

LOTN sought leave to appeal in this Court. We granted leave to appeal, asking the parties to address:

> whether the Court of Appeals erred in holding that the plaintiff contractor, who filed a claim of lien under the Construction Lien Act (CLA), MCL 570.1101 et seq., and then filed a circuit court action against the defendant property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as a "prevailing party" under MCL 570.1118(2), when the plaintiff prevailed in binding arbitration on its contract claim, but neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim. See *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007).[8]

II. STANDARD OF REVIEW

We review a trial court's award of attorney fees and

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[3] *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 306 Mich App 203, 214; 854 NW2d 744 (2014).

[4] *Id*. at 211.

[5] *H A Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007).

[6] *Ronnisch*, 306 Mich App at 213.

[7] *Id*. at 211.

[8] *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 497 Mich 1003 (2015).

costs for an abuse of discretion.[9] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[10] A trial court necessarily abuses its discretion when it makes an error of law.[11]

Questions of statutory interpretation are reviewed de novo.[12] In interpreting § 118(2), our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language.[13] In doing so, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.[14] When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.[15]

III. ANALYSIS

The CLA is "intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs."[16] The fundamental purpose of the CLA with respect to contractors, workers, and suppliers is to provide a method to secure payment for their labor and

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[9] *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[10] *Id*.

[11] *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

[12] *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014).

[13] *Id*. at 696.

[14] *Id*.

[15] *Id*.

[16] *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997); see also 1980 PA 497, title (stating that the CLA is an act "to establish, protect, and enforce by lien the rights of persons performing labor or providing material or equipment for the improvement of real property").

materials.[17] The Legislature has declared that the CLA is "a remedial statute . . . [that] shall be liberally construed to secure the beneficial results, intents, and purposes of th[e] act."[18] Accordingly, when interpreting the CLA, we should always be mindful of the CLA's intended purpose.[19]

In this case, RCG sued to recover the unpaid amount on its contract and, after receiving a favorable arbitration award, sought attorney fees under § 118(2) of the CLA, which reads in pertinent part:

> In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorneys' fees to a lien

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[17] See *Smalley v Gearing*, 121 Mich 190, 198; 79 NW 1114 (1899) (stating that the Mechanics' Lien Act "provide[d] a method for securing payment to those whose labor or material goes into the building . . . "). That the CLA is designed to protect the interests of such parties is further supported by the substantial-compliance provision contained in the act. See MCL 570.1302(1).

[18] MCL 570.1302(1). This provision, like its predecessor in the Mechanics' Lien Act, former MCL 570.27, codifies the longstanding principle that construction lien statutes must be liberally construed to effectuate their purpose. See *Scales v Griffin*, 2 Doug 54, 59 (Mich, 1845). We agree with the dissent that a "provision requiring that a statute be liberally construed 'should be regarded as requiring a fair interpretation as opposed to a strict or crabbed one—which is what courts are supposed to provide anyway.' " *Post* at 572 n 12, quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 233. We disagree that merely citing such a directive—like the dissent's author did recently in *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016)—implies otherwise. Notably, it is this very principle—fairly interpreting the text of the statute at issue—that impels us to reject the dissent's "crabbed" interpretation of the statute.

[19] *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park*, 400 Mich 184, 188; 253 NW2d 646 (1977).

claimant who is the prevailing party.[20]

Application of § 118(2) in this case requires us to determine whether RCG was (1) a lien claimant, (2) in an action to enforce a construction lien through foreclosure, (3) who was the prevailing party.

A. RCG WAS A LIEN CLAIMANT

The first inquiry in determining whether a party may seek attorney fees under the CLA is whether the party is a lien claimant. Under § 118(2), the trial court has discretion to award attorney fees to "a lien claimant who is the prevailing party." The CLA defines a "lien claimant" as "a person having a right to a construction lien under [the] act."[21] RCG had a valid claim of lien that attached to LOTN's interest in the property.[22] Further, it is undisputed that LOTN did not tender full payment to RCG on the contract amount before the arbitration award. Therefore, when RCG

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[20] Additionally, the statute provides that a court may allow reasonable attorney fees to a prevailing defendant if the court determines that the lien claimant's action to enforce a construction lien was vexatious. MCL 570.1118(2).

[21] MCL 570.1105(2).

[22] RCG's construction lien on LOTN's interest in the condominium building arose once it made improvements to the condominium building. MCL 570.1107(1). That lien attached to LOTN's entire interest. MCL 570.1107(2). RCG properly filed its claim of lien in the amount of $626,163.73 within 90 days after it last furnished labor or material, and its lien was properly recorded on June 2, 2009. See MCL 570.1111(1). Therefore, we agree with the trial court's determination that RCG perfected its lien. However, if a lien claim has not been adjudicated when a dispositive ruling on the underlying contract claim is made, and questions regarding the validity of a plaintiff's lien remain, they can be resolved in conjunction with a motion to award attorney fees. The plaintiff then would still have the burden to prove the validity of the lien. See *Skyhook Lift-Slab Corp v Huron Towers, Inc*, 369 Mich 36, 39; 118 NW2d 961 (1963) (stating that the plaintiff bears the burden of demonstrating compliance with the statutory requirements necessary for a

received its arbitration award, it was a lien claimant because it possessed "a right to a construction lien" under the CLA.[23]

Our conclusion that RCG was a lien claimant makes the instant case distinguishable from this Court's order in *Decina*. LOTN's argument that *Decina* controls the outcome of this case overlooks the crucial distinction between the two—RCG was a lien claimant under § 118(2) when it received a favorable determination on its contract claim, whereas the subcontractors in *Decina* were not.

The litigation in *Decina* stemmed from a construction contract dispute between homeowners, their general contractor, and two subcontractors.[24] The dispute arose after the homeowners withheld final payment to the general contractor and after the general contractor did not pay the subcontractors for the labor and materials they provided.[25] Pertinent to this case, the subcontrac-

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lien claim); *In re Eddy Estate*, 354 Mich 334, 348; 92 NW2d 458 (1958) (recognizing that the party seeking attorney fees bears the burden of proving entitlement to those fees).

[23] MCL 570.1105(2). The fact that RCG was not determined to be a lien claimant before the arbitration award is not dispositive. Instead, the material inquiry is whether RCG, as the party seeking fees, was a lien claimant under the CLA *when it became the prevailing party* by virtue of the arbitration award in its favor. Contrary to the dissent's view, we do not believe that whether RCG was a lien claimant at that critical moment is contingent on a prior or contemporaneous judicial determination that it had a right to a lien. It is ironic that in an opinion that claims a monopoly on the statutory text, the dissent hinges its analysis on a requirement that is nowhere to be found in the text of the CLA. See MCL 570.1105(2) (defining "lien claimant" as "a person having a right to a construction lien under this act").

[24] *H A Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 421-422; 670 NW2d 729 (2003), vacated in part 471 Mich 925 (2004). The subcontractors contracted with the general contractor to provide materials and labor. *Decina*, 258 Mich App at 422.

[25] *Id*.

tors brought lien foreclosure claims against the homeowners and breach of contract claims against the general contractor.[26]

Following a bench trial, the trial court ruled that the homeowners had paid the entire contract amount to the general contractor and that the subcontractors' liens therefore did not attach to the property because the homeowners had paid the contract amount in full.[27] But the trial court ruled in favor of the subcontractors on their breach of contract claims and subsequently ordered the general contractor to pay their attorney fees.[28] The Court of Appeals affirmed, holding that the subcontractors were a prevailing party because they had prevailed on "a claim brought in the alternative for the same injury or loss raised in the CLA claim."[29]

This Court reversed by order and vacated the trial court's order granting attorney fees. This Court stated that to be a "prevailing party" under § 118(2), the party "must prevail on the lien foreclosure action."[30] This Court then held that the subcontractors lost on their lien claim and therefore could not recover attorney fees, stating:

> In this case, the unpaid subcontractors filed a lien foreclosure action against the property owners and a breach of contract action against the general contractor. The sub-

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[26] *Id*. at 423. Although the subcontractors did not contract with the homeowners directly, they were nevertheless at least initially entitled to a construction lien under the CLA. See MCL 570.1107(1) ("Each . . . subcontractor . . . who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to real property . . . .").

[27] *H A Smith Lumber & Hardware Co v Decina (On Remand)*, 265 Mich App 380, 382; 695 NW2d 347 (2005), rev'd 480 Mich 987 (2007).

[28] *Id*.

[29] *Id*. at 384-385.

[30] *Decina*, 480 Mich at 988.

> contractors lost on their lien claim but prevailed on the breach of contract claim. While the statute allows a lien claimant to bring an underlying contract action at the same time as the lien foreclosure action, it does not preclude the option of bringing the two actions separately. MCL 570.1117(5). If the subcontractors had chosen to bring their breach of contract claims against the general contractor as a separate action, they would not have been allowed to recover attorney fees. The language of MCL 570.1118(2) does not permit recovery of attorney fees on the contract action merely because it was brought together with the lien foreclosure action.[31]

As noted earlier, the crucial distinction between *Decina* and the instant case is that the subcontractors in *Decina* were not lien claimants. In *Decina*, the trial court found that the homeowners had paid the entire contract amount owed to the general contractor.[32] The homeowners' tender of full payment extinguished the subcontractors' right to a construction lien under the CLA.[33] Accordingly, this Court rightly acknowledged that the subcontractors lost on their lien claims.[34] Therefore, the *Decina* subcontractors no longer had "a right to a construction lien under [the CLA]" and thus could no longer be considered "lien claimants."[35] The rule that emerges from *Decina* is simple—a party cannot lose on its lien claim and receive attorney fees under § 118(2). As a result, the subcontractors in *Decina* could not seek attorney fees under § 118(2)

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[31] *Id*.

[32] *Decina*, 258 Mich App at 424, 431.

[33] See MCL 570.1107(1) and (6); see also *Vugterveen*, 454 Mich at 129 (recognizing that MCL 570.1107(6) provides a real property owner with a defense to a claim of lien if the owner can show that the sum of payments made pursuant to the specific contract plus the claim of lien exceed the price of the contract).

[34] *Decina*, 480 Mich at 988.

[35] MCL 570.1105(2).

because fees under that section may only be awarded to "a *lien claimant* who is the prevailing party."[36]

Accordingly, *Decina* does not control the outcome of this case. In contrast to the subcontractors in *Decina*, RCG was a lien claimant when it received its arbitration award because it possessed "a right to a construction lien" under the CLA.[37]

B. RCG BROUGHT AN ACTION TO ENFORCE A CONSTRUCTION LIEN THROUGH FORECLOSURE

We next turn to whether RCG was the prevailing party in an *action to enforce a construction lien through foreclosure* when its lien claim was not adjudicated but it prevailed on its related contract claim. We conclude that the plain language of § 118(2) does not expressly limit the trial court's ability to award attorney fees to a lien claimant who is the prevailing party *on the lien claim*. Rather, reading the statute as a whole makes clear that a "lien claimant who is the prevailing party" may seek attorney fees "[i]n an *action* to enforce a construction lien through foreclosure . . . ."[38]

The language of § 118(2) indicates that the Legislature was aware that an action to enforce a construction lien through foreclosure may involve multiple, separate claims. The first sentence of § 118(2) reads, "In *an action to enforce a construction lien through foreclosure*, the court shall examine *each claim* and defense

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[36] MCL 570.1118(2) (emphasis added). Accordingly, this Court correctly recognized that § 118(2) did "not permit recovery of attorney fees on the contract action merely because it was brought together with the lien foreclosure action." *Decina*, 480 Mich at 988. Put simply, bringing lien foreclosure and contract claims in the same action did not allow the *Decina* subcontractors to evade the lien claimant requirement.

[37] MCL 570.1105(2).

[38] MCL 570.1118(2).

that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities."[39] We presume the Legislature knew the meaning of the words it used when drafting this provision.[40] And, here, the Legislature used the terms "action" and "claim" in the same sentence. An "action" is "[a] civil or criminal judicial proceeding."[41] "A party bringing an 'action' seeks to recover from the opposing party . . . ."[42] On the other hand, "a claim consists of facts giving rise to a right asserted in a judicial proceeding, which is an action. In other words, the action encompasses the claims asserted."[43] Accordingly, in § 118(2), the phrase "action to enforce a construction lien through foreclosure" refers to a civil judicial proceeding in which foreclosure of a construction lien is sought, and it is comprised of all the claims asserted in the action,

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[39] Emphasis added. The Legislature's understanding that separate claims could be brought in the foreclosure action is also reflected elsewhere in the CLA. See MCL 570.1117(5) ("In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose.").

[40] *Auditor General v McLaulin*, 83 Mich 352, 354; 47 NW 233 (1890).

[41] *Black's Law Dictionary* (10th ed). To understand the meaning of words in a statute that are not otherwise defined, we may resort to dictionary definitions for guidance. *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002). Because the terms at issue in this case have a peculiar legal meaning, it is appropriate to consult a legal dictionary. *Id*. at 304-305. See also MCL 8.3a.

[42] *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 530; 872 NW2d 412 (2015).

[43] *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 555; 640 NW2d 256 (2002). *Black's Law Dictionary* (10th ed) defines "claim" as:

> **1.** A statement that something yet to be proved is true . . . . **2.** The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . **3.** A demand for money, property, or a legal remedy to which one asserts a right; [especially], the part of a complaint in a civil action specifying what relief the plaintiff asks for.

including any related claim for breach of contract.[44] By beginning with the phrase "[i]n an action to enforce a construction lien through foreclosure," § 118(2) establishes that the focus is on whether the lien claimant is a prevailing party in the action (i.e., the entirety of the judicial proceeding) in which the lien foreclosure claim was asserted.[45]

There is no indication from the language of § 118(2) that the lien claimant must receive a judgment on its foreclosure claim for it to be the prevailing party. The Legislature directed the trial court to "examine *each claim* and defense that is presented and determine the amount, if any, due to each lien claimant . . . ."[46] Consistent with this directive, a lien claimant in such an

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[44] Some of the confusion underlying the proper interpretation of § 118(2) may stem from the fact that "action" and "cause of action," i.e., a claim, are often used synonymously, although they do not strictly and technically have the same meaning. *Otto v Village of Highland Park*, 204 Mich 74, 80; 169 NW 904 (1918). For instance, in MCL 570.1117(5), the Legislature used "action" to refer both to a judicial proceeding and to a claim that may be asserted within that proceeding. In such circumstances, we must be careful to look for contextual clues in discerning the meaning of the words in the statute.

In *Decina*, this Court correctly noted that under § 118(2), the party must prevail on the lien foreclosure action which, under the plain language of § 118(2), refers to a judicial proceeding. But, perhaps influenced by the inartful drafting of the CLA, the *Decina* Court also used the terms "action" and "claim" interchangeably. See, e.g., *Decina*, 480 Mich at 988 ("The subcontractors lost on their lien claim but prevailed on the breach of contract claim. While the statute allows a lien claimant to bring an underlying contract action at the same time as the lien foreclosure action, it does not preclude the option of bringing the two actions separately."). Nevertheless, despite this confusion, the rule emerging from *Decina* is clear—a party that lost on its lien claim cannot receive attorney fees under § 118(2).

[45] In interpreting statutes, "words and clauses will not be divorced from those which precede and those which follow." *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955).

[46] MCL 570.1118(2) (emphasis added).

action might prevail on its related breach of contract claim and receive the entire amount to which it is entitled under its lien claim. In that scenario, the lien claimant would have prevailed in its *action* to enforce the construction lien despite not winning its specific lien foreclosure claim and, thus, would be entitled to attorney fees under § 118(2).[47]

Under Michigan law, a lien foreclosure claim and a claim for breach of the underlying contract are integrally related. A contract is a necessary prerequisite to a construction lien.[48] A construction lien stems from the underlying contract,[49] and its amount is determined by the contract's terms.[50] These principles are reflected throughout the CLA.[51] In essence, "[t]he lien is but a means for enforcing the payment of the debt arising

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[47] As explained later in this opinion, this is because the lien claimant will have used the CLA to achieve its main objective in filing suit, i.e., to obtain payment for its labor or materials.

[48] See *Willard v Magoon*, 30 Mich 273, 279 (1874).

[49] See *Canvasser Custom Builders, Inc v Seskin*, 38 Mich App 643, 647-648; 196 NW2d 859 (1972).

[50] *Erb Lumber Co v Homeowner Constr Lien Recovery Fund*, 206 Mich App 716, 722; 522 NW2d 917 (1994).

[51] For example, in order to enter a judgment of foreclosure, the court must find that the amount adjudged to be due on the contract has not been paid. MCL 570.1121(1); *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 294; 480 NW2d 343 (1991). ("We conclude, therefore, that although the amount of damages that plaintiff can recover for breach of contract has been fixed by the mediation award, thereby limiting the amount that may be claimed under the construction lien, plaintiff maintains its right to collect those damages through the remedy provided by the construction lien."). See also MCL 570.1107(1) ("A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract."); MCL 570.1113(1) (stating that an owner or lessee must make a copy of the contract available for inspection upon written demand by a lien claimant); MCL 570.1114 (stating that a contractor must have a written contract in order to have a right to a construction lien on the interest of an owner or lessee in a residential structure); MCL 570.1117(5) ("In connection with

from the performance of the contract . . . ."[52] A party may proceed to enforce its lien through foreclosure while simultaneously seeking recovery based on the contract from which the lien arose.[53] But there can only be one satisfaction.[54] Thus, a lien foreclosure claim and a claim for breach of the underlying contract are integrally related, and allowing a party to pursue both "merely gives it a better chance of recovering what it is owed."[55]

In the instant case, RCG filed a complaint alleging claims for breach of contract and foreclosure of its lien. Because these claims are integrally related, if RCG is able to establish that it prevailed on its breach of contract claim, it will have prevailed in its "action to enforce a construction lien through foreclosure . . . ."[56]

C. RCG WAS A PREVAILING PARTY

Having determined that RCG was a lien claimant in an action to enforce a construction lien through foreclosure, we must finally determine whether RCG was the prevailing party given that it received a net arbitration award of $450,820.36 in its favor.[57]

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an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose.").

[52] *John S Hanes & Co v Wadey*, 73 Mich 178, 181; 41 NW 222 (1889).

[53] *F M Sibley Lumber Co v Wayne Circuit Judge*, 243 Mich 483, 485-489; 220 NW 746 (1928). This may occur by bringing foreclosure and contract claims in the same action, as in the instant case, or by proceeding with separate contract and foreclosure actions, as in *Bosch v Altman Constr Corp*, 100 Mich App 289, 292-293; 298 NW2d 725 (1980).

[54] See *F M Sibley*, 243 Mich at 486, quoting 40 CJ, p 367.

[55] *Old Kent Bank of Kalamazoo v Whitaker Constr Co*, 222 Mich App 436, 439; 566 NW2d 1 (1997).

[56] See MCL 570.1118(2).

[57] As the Court of Appeals panel observed, the amount awarded was 72% of the amount RCG requested. *Ronnisch*, 306 Mich App at 207 n 4.

Neither the CLA nor *Decina* define the term "prevailing party"; however, as a legal term of art, it must be construed and understood according to its peculiar and appropriate meaning.[58] A "prevailing party" is "[t]he party to a suit who successfully prosecutes the action . . . , prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered."[59] For there to be a "prevailing party," there must have been a material and enforceable alteration of the legal relationship of the parties resulting from judicial imprimatur.[60]

In this case, RCG received an award on its contract claim pursuant to a final and binding arbitration. This award constituted a conclusive determination of the rights and obligations of the parties.[61] That is, the arbitration produced an enforceable award that altered the legal relationship of the parties. Moreover, through the arbitration award, RCG prevailed on the main issue in the action, i.e., it obtained an enforceable award compensating it for its labor and materials.[62] Under the CLA, a lien claimant becomes the prevailing

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[58] MCL 8.3a. In ascertaining the meaning of a term, a court may determine the meaning at the time the statute was enacted by consulting dictionaries from that time. See, e.g., *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005); *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004).

[59] *Black's Law Dictionary* (5th ed).

[60] See *Buckhannon Bd & Care Home, Inc v West Virginia Dep't of Health & Human Resources*, 532 US 598, 602-605; 121 S Ct 1835; 149 L Ed 2d 855 (2001); *id*. at 622 (Scalia, J., concurring).

[61] See *Corallo v Merrick Central Carburetor, Inc*, 733 F2d 248, 252 (CA 2, 1984); *Marion Mfg Co v Long*, 588 F2d 538, 541 (CA 6, 1978); *Nix v Spector Freight Sys, Inc*, 264 F2d 875, 877 (CA 3, 1959).

[62] As previously noted, one of the fundamental purposes of the CLA is to protect contractors, workers, and suppliers by providing a method to secure payment for their labor and materials.

party when the rights and obligations of the parties that are at the heart of its lien claim are conclusively determined in its favor. RCG's contract and lien foreclosure claims both sought to obtain payment for the labor and materials supplied by RCG, and both claims necessarily required determinations to be made regarding the parties' rights and obligations stemming from the underlying contract.[63] By prevailing on one of those claims—the contract claim—RCG successfully prosecuted the action, receiving the requisite conclusive determination and thereby prevailing on its main issue.[64]

Further, that the trial court never entered a judgment confirming the arbitration award does not preclude us from determining that RCG was the prevailing party. The lack of judicial imprimatur in RCG's

[63] The dissent frets that allowing attorney fees when a party prevails on the related contract action will open the floodgates to claims for attorney fees under § 118(2) any time a party prevails on other, unspecified, ancillary claims. However, it is hard to imagine other ancillary claims bearing as close a relationship as the lien foreclosure and underlying contract claims. The plain language of the CLA contemplates that a party may achieve its main objective through either of these integrally related claims. And, not surprisingly, while the CLA repeatedly refers to the underlying contract, it does not specifically refer to any other ancillary claims. See note 51 of this opinion. In any event, such claims are not at issue here, and, to the extent they may exist, this Court can address them in a future case.

[64] That RCG did not recover the full amount of damages sought is not dispositive with regard to whether it was a prevailing party. For the related determination whether a party is the prevailing party for the purposes of MCR 2.625 (concerning taxation of costs), courts have held that recovery of the full amount of damages is unnecessary. See *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998). Instead, "in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation." *Id*. RCG can certainly demonstrate that its position was improved by the litigation given that it recovered 72% of the amount sought.

favor is a direct result of the trial court's failure to confirm RCG's arbitration award upon its motion.[65] Contrary to the trial court's conclusion, LOTN's payment of the arbitration award did not obviate the need to confirm the award. In certain circumstances, confirmation may be necessary even if the award has been satisfied. For instance, the winning party at arbitration may desire to seek costs.[66] Or, as in the instant case, a party may wish to seek attorney fees. Although Michigan courts have not spoken on the issue, we agree with a number of other courts that a party cannot avoid confirmation by paying an arbitration award before the confirmation proceeding.[67] Therefore, LOTN's payment of the arbitration award should not

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[65] Under MCR 3.602(I), "[a] party may move for confirmation of an arbitration award within one year after the award was rendered." "Confirmation is a summary proceeding where the court merely converts an arbitration award into a final judgment." 6 CJS, Arbitration, § 181, p 248 (2004). A party may seek confirmation for various reasons. For instance, a party may initiate confirmation proceedings if it desires that an official record of the confirmation and judgment be made. See 6 CJS, Arbitration, § 178, pp 244-246 (2004).

[66] See MCR 3.602(M).

[67] See, e.g., *Henderson v Summerville Ford-Mercury Inc*, 405 SC 440, 454; 748 SE2d 221 (2013) (holding that payment does not moot a confirmation request); *Drummond v State Farm Mut Auto Ins Co*, 280 Neb 258, 262; 785 NW2d 829 (2010) (same); *Mikelson v United Servs Auto Ass'n*, 122 Hawaii 393, 400-401; 227 P3d 559 (Hawaii Ct App, 2010) (concluding that satisfaction did not render confirmation moot because confirmation was statutorily mandated and because confirmation is concerned with the propriety of the award itself and is unrelated to enforcement); *In re Bernstein Family Ltd Partnership v Sovereign Partners, LP*, 66 AD3d 1, 6; 883 NYS2d 201 (2009) ("[I]t is irrelevant in a proceeding to confirm an award whether there is a dispute about whether the award has been fully satisfied."); *Collins v D R Horton, Inc*, 361 F Supp 2d 1085, 1093 (D Ariz, 2005) (holding that confirmation was mandatory, regardless of payment, unless the award is modified, vacated, or corrected); *Pacific Law Group: USA v Gibson*, 6 Cal App 4th 577, 580; 7 Cal Rptr 2d 878 (1992) (holding that nothing in California's arbitration statute limits confirmation to circumstances in which the award has not been paid).

have precluded the trial court from providing the necessary judicial imprimatur in this case by confirming the award.[68]

Finally, we disagree with the dissent's interpretation of the statute, which would require RCG to refuse the proffered payment and continue to litigate its foreclosure claim to remain eligible to seek attorney fees under § 118(2). Such a conclusion would encourage gamesmanship by defendants, allowing them to prolong litigation and delay payment on the contract claim in an attempt to drain the lien claimant's resources before it can obtain a judgment on its lien claim and seek attorney fees.[69] It also directly contravenes this Court's policy of encouraging settlements and discouraging litigation.[70] Therefore, we instead conclude that RCG's acceptance of payment did not preclude it from

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But see *Stewart Title Guaranty Co v Tilden*, 2003 Wy 31, ¶ 9; 64 P3d 739 (2003) (holding that a trial court may deny a confirmation motion when satisfaction has rendered the controversy moot); *Murphy v Nat'l Union Fire Ins Co*, 438 Mass 529, 533; 781 NE2d 1232 (2003) (same); *Kenneth W Brooks Trust A v Pacific Media LLC*, 111 Wash App 393, 400; 44 P3d 938 (2002) (same); *Derwin v Gen Dynamics Corp*, 719 F2d 484, 491-493 (CA 1, 1983) (affirming the trial court's denial of confirmation of the award on the ground that confirmation was unwarranted given that the award had been satisfied).

[68] Nor does LOTN's payment of the arbitration award before confirmation affect RCG's status as a prevailing party. Rather, its status as a prevailing party is determined as of the date of the arbitration award, not any subsequent judgment confirming the award. See *Marion*, 588 F2d at 541 ("Thus, if the [arbitration] award is upheld in a reviewing court, the rights of the parties are determined from the date of the award and not the date of the court's judgment confirming the award."); 4 Am Jur 2d, Alternative Dispute Resolution, § 204, p 261 (2016).

[69] Cf. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002) ("A lien claimant without significant financial resources could end up being forced to abandon his valid lien claim if met with resistance from the lienor at every turn.").

[70] See *Mayhew v Berrien Co Rd Comm*, 414 Mich 399, 410; 326 NW2d 366 (1982); *People v Gill*, 247 Mich 479, 480; 226 NW 214 (1929).

seeking attorney fees.[71]

We hold that RCG was entitled to seek attorney fees under the CLA because it prevailed on the main issue in its construction lien action when it received a favorable arbitration award on its contract claim. The arbitration award constituted a conclusive and enforceable determination of the rights and obligations of the parties that were at the heart of RCG's lien claim. Therefore, RCG was the prevailing party in its action to enforce a construction lien through foreclosure.[72]

IV. CONCLUSION

We hold that the trial court may award attorney fees to RCG because it was a lien claimant who was the prevailing party in an action to enforce a construction lien through foreclosure by virtue of receiving a favorable arbitration award on its breach of contract claim. The judgment of the Court of Appeals is affirmed, and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.[73]

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[71] The dissent asserts that RCG's acceptance of LOTN's payment extinguished its right to a lien, thereby precluding it from later seeking attorney fees. But this argument loses sight of the CLA's plain language, which only requires that a party be a lien claimant when it becomes the prevailing party, not when it seeks attorney fees. See MCL 570.1118(2). Because RCG became the prevailing party by virtue of the arbitration award in its favor, LOTN's subsequent payment did not bar RCG from seeking attorney fees. See *Solution Source*, 252 Mich App at 381 ("Therefore, we hold that satisfaction of a lien does not bar a lien claimant who is the prevailing party from recovering its appellate and postjudgment attorney fees incurred in connection with enforcement of its lien.").

[72] We disagree with the dissent's assertions that our opinion is not faithful to the text, context, and purpose of the CLA. Instead, we believe it is painstakingly so and that the dissent's histrionics are a poor substitute for proper legal analysis.

[73] We note that under MCL 570.1118(2), "[t]he court *may* allow reasonable attorneys' fees . . . ." (Emphasis added.) The use of the term

MARKMAN, MCCORMACK, and BERNSTEIN, JJ., concurred with VIVIANO, J.

YOUNG, C.J. (*dissenting*). I respectfully, but vigorously, dissent. The majority opinion has done a remarkable thing. It has, through creative statutory interpretation, transformed an act that it acknowledges is solely designed to compensate workers and contractors who prevail on their construction liens into a vehicle for recovery of attorney fees for parties who *have not* prevailed—and cannot now prevail—on their construction liens. Inasmuch as I believe that the Legislature has, by every means at its disposal, textually communicated that recovery of attorney fees under the Construction Lien Act (CLA)[1] is permitted only to those parties who prevail on a *construction lien*, I cannot join the majority opinion.

I. FACTS AND PROCEDURAL HISTORY

While I agree with the majority opinion's statement of the facts, I provide here certain additional facts that I think are important to the proper outcome in this case. At the conclusion of arbitration, the arbitrator rendered a net award of $450,820.36 to Ronnisch Construction Group (RCG). The arbitration award expressly stated that RCG's award was based on

"may" indicates discretionary, rather than mandatory, action. *Murphy v Mich Bell Tel Co*, 447 Mich 93, 100; 523 NW2d 310 (1994). Thus, a party who demonstrates that it is a prevailing lien claimant in an action to enforce a construction lien through foreclosure may seek and be awarded attorney fees under MCL 570.1118(2) but is not entitled to them. On remand, the decision to award reasonable attorney fees remains within the sound discretion of the trial court. See *Vugterveen*, 454 Mich at 133 ("A court has discretion to award attorney fees to a prevailing lien claimant . . . .").

[1] MCL 570.1101 *et seq*.

"[d]irect damages for work performed under the Construction Contract." Additionally, at three separate places within the award, the arbitrator noted that he was reserving the issue of RCG's attorney fees under the CLA. The arbitrator expressly stated:

> The Arbitrator makes no award as to RCG's claim for attorney fees and costs under [MCL 570.1118(2)], and the issue of such attorney fees and costs under the Construction Lien Act is reserved for the Circuit Court in the underlying lawsuit . . . .

Lofts on the Nine (LOTN) paid the arbitration award in full by wiring $484,319.76[2] to the client trust account of RCG's counsel. RCG never returned or otherwise rejected the wire transfer payment. And RCG seemed to realize that acceptance of full payment jeopardized its attorney fees claim because it attempted to condition its acceptance of the payment on being able to seek attorney fees in the trial court. This offer of conditional acceptance was declined by LOTN.[3] RCG then moved in the trial court to lift the stay of proceedings, affirm the arbitration award, and award attorney fees under the CLA, claiming that it was a prevailing-party lien claimant under MCL 570.1118(2). The trial court denied RCG's motion for attorney fees, determining that at no

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[2] This payment included the net arbitration award plus accrued interest.

[3] RCG thus implicitly recognized that, by unconditionally accepting payment, its attorney fees claim could be extinguished, which it, in fact, was. To maintain that claim, RCG could have refused to accept the proffer of payment and extinguishment of its lien—as contemplated in *Bosch v Altman Constr Corp*, 100 Mich App 289, 297; 298 NW2d 725 (1980) ("[A] lienor is not required to accept tender of payment after a complaint has been filed if he wishes to pursue his statutory right to attorney fees.")—or it could have bargained with LOTN for a larger payment that took into account that accepting payment before adjudication of RCG's lien claim would extinguish the lien claim *and* RCG's attendant claim for attorney fees. None of that happened in this case.

point in the proceedings had RCG's CLA claim ever been adjudicated—either by the arbitrator or the trial court. Most important for this case, the trial court also held that RCG's lien claim was extinguished when RCG voluntarily accepted LOTN's tender of payment before equitable proceedings on the lien claim.

The Court of Appeals vacated the portion of the trial court's order pertaining to RCG's attorney fees and remanded the case to the trial court for further proceedings, holding that the trial court erred by holding that it could not award RCG attorney fees and costs under the CLA because RCG "did not *solely* seek recovery on a breach of contract claim: plaintiff's complaint listed both a contract claim and a foreclosure-of-lien claim."[4] On this basis, the Court of Appeals panel concluded that RCG was a prevailing lien claimant under MCL 570.1118(2).[5] LOTN applied for leave to appeal, which this Court granted.[6]

II. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to award attorney fees for an abuse of discretion.[7] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[8] Issues of statutory construction are reviewed de novo.[9]

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[4] *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 306 Mich App 203, 205, 212; 854 NW2d 744 (2014).

[5] *Id*. at 214.

[6] *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 497 Mich 1003 (2015).

[7] *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[8] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

[9] *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133; 860 NW2d 51 (2014).

III. ANALYSIS

Surprisingly, the CLA is about *construction liens*. The title of the CLA explicitly states that its purpose is

> to establish, protect, and enforce *by lien* the rights of persons performing labor or providing material or equipment for the improvement of real property; *to provide for defenses to construction liens*; to provide remedies and prescribe penalties; and to repeal acts and parts of acts.[10]

The majority begins, as it must, by recognizing the purpose of the act. The majority does not have to speculate on this point because the Legislature has been kind enough to spell out the purpose of the CLA—both in the title and the text of the statute. As the majority opinion observes:

> The CLA is "intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." The fundamental purpose of the CLA with respect to contractors, workers, and suppliers is to provide a method to secure payment for their labor and materials. The Legislature has declared that the CLA is "a remedial statute . . . [that] shall be liberally construed to secure the beneficial results, intents, and purposes of th[e] act." Accordingly, when interpreting the CLA, we should always be mindful of the CLA's intended purpose.[11]

And that is the last time the majority opinion pays attention to the purpose and text of the CLA.[12]

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[10] 1980 PA 497, title, as amended by 2010 PA 147 (emphasis added). "Although a [title] is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope." *Malcolm v East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991).

[11] *Ante* at 552-553 (citations omitted; alterations in original).

[12] The majority disregards this Court's duty to give the statutory language its fair meaning by relying, at least in part, on the legislative directive that the act be " 'liberally construed.' " See *ante* at 553 (citation

The CLA actually defines who can recover attorney fees and requires that there be a *present* "right" to a lien. As I stated at the outset, the Legislature has textually communicated that this act concerns one thing: how *construction lien* disputes should be resolved. Not surprisingly, the Legislature begins by calling the statute the "construction lien act"[13] and then prescribes a procedure by which claims associated with construction lien disputes shall be resolved.[14] The Legislature was also very specific regarding who can recover attorney fees in these cases:

> In an action *to enforce a construction lien through foreclosure*, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. *The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party*.[15]

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omitted). The majority has mistaken the directive for liberal construction as free rein to expand the statute to construct an attorney fees remedy that lacks textual and contextual support. Statutory interpretation, whether liberal or strict, is rendered illegitimate when the fair meaning of a text is disregarded. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 233 (stating that a legislative provision requiring that a statute be liberally construed "should be regarded as requiring a fair interpretation as opposed to a strict or crabbed one—which is what courts are supposed to provide anyway"). A liberal interpretation is " 'clearly inadmissible, if it extends beyond the just and ordinary sense of the terms.' " *Id*. at p 364, quoting 1 Story, *Commentaries on the Constitution of the United States* (2d ed, 1858), § 429, p 304.

[13] MCL 570.1101.

[14] See, e.g., MCL 570.1117 (providing extensive procedural requirements for the enforcement of a construction lien under the CLA).

[15] MCL 570.1118(2) (emphasis added). Additionally, the statute provides that a court may allow reasonable attorney fees to a prevailing defendant if the court determines that the lien claimant's action to enforce a construction lien was vexatious. MCL 570.1118(2).

Again, the Legislature has been careful to inform us who is entitled to recover attorney fees under the CLA because it has also defined a critical term in the quoted provision—who is a "lien claimant." The term "lien claimant" is statutorily defined as "a person *having a right* to a construction lien under this act."[16] Grammatically, this requires that the claimant have a *present*, not a *previous* or *theoretical*, right to a lien at the time the claimant is "the prevailing party." Therefore, under a plain reading of the statute, a trial court may only award attorney fees to a person who "ha[s] a right to a construction lien under [the CLA]"[17] when that person "is the prevailing party" "[i]n an action to enforce a construction lien through foreclosure . . . ."[18]

While there are many additional textual indications that the Legislature intended to make attorney fees available only to those who prevailed on their lien claims (some of which I shall shortly address), the fatal flaw of the majority opinion is that it gives no meaning to this definition when it provides attorney fees to RCG, which, not having been adjudicated the prevailing party on the construction lien claim before accepting full payment, plainly was no longer a lien claimant, much less a prevailing one.

In this case, as it was permitted to do under the statute, RCG asserted claims under both the CLA and standard contract law.[19] Importantly, the trial court determined that RCG had prevailed only on its con-

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[16] MCL 570.1105(2) (emphasis added).

[17] *Id*. Under the CLA, "person" is defined as "an individual, corporation, partnership, sole proprietorship, association, other legal entity, or any combination thereof." MCL 570.1106(1).

[18] MCL 570.1118(2).

[19] MCL 570.1117(5) ("In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose.").

tract claim, for which attorney fees are not generally available.[20] RCG's contract claim and lien claim were for identical amounts—a common occurrence, as the CLA expressly requires that a lien under the act "shall not exceed the amount of the lien claimant's contract less payments made on the contract."[21] While RCG prevailed at arbitration, it did so only on its contract claim, not the lien claim. Most legally significant, it received and accepted payment in full for all its damages incurred under the contract. As the trial court held at the time RCG moved for attorney fees, RCG had *extinguished* any claimed lien by accepting full payment. Neither the Court of Appeals nor the majority opinion explains why the trial court's holding is erroneous. There is a reason: the trial court's holding is legally correct.

The majority opinion simply fails to acknowledge that RCG was never more than a presumptive lien claimant that extinguished its lien before the validity of its lien claim was ever determined. No one has disputed that acceptance of the full amount of the arbitration award on the contract actually *extinguished* RCG's lien. The CLA provides that a lien cannot "exceed the amount of the lien claimant's contract *less payments made on the contract*."[22] Accordingly, when RCG moved

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[20] See *Haliw v Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005).

[21] MCL 570.1107(1).

[22] MCL 570.1107(1) (emphasis added). Once there was no longer any amount still owed on the construction contract, RCG clearly did not "hav[e] a *right* to a construction lien under this act." MCL 570.1105(2) (emphasis added). See also *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 380; 652 NW2d 474 (2002) ("[I]f a construction lien has *not* been satisfied or discharged before trial, a court still has jurisdiction to award attorney fees in relation to enforcement or collection of the lien.") (emphasis added). In this case, the lien was satisfied before it was ever adjudicated on the merits, and the trial

in the trial court for an award of attorney fees, it was no longer a "person *having a right* to a construction lien under this act."[23] Even though RCG could no longer legally satisfy the statutory definition of a "lien claimant who is the prevailing party,"[24] the majority opinion has ignored this as an inconvenient fact en route to permitting RCG's recovery of attorney fees for prevailing on a *contract* claim.

In sum, there are two separate periods at issue in this case: (1) before RCG accepted LOTN's offer of full payment on the arbitration award, and (2) after it accepted full payment. Before the acceptance of the payment, there had never been any determination that RCG was a valid "lien claimant"—that is, whether RCG was "a person *having a right* to a construction lien under this act."[25] And after RCG accepted the payment, there was no more debt on which any lien could be based.[26]

The majority opinion ignores the grammatical tense of the critical provisions—that attorney fees are only available to "a lien claimant who *is* the prevailing party"[27] and that a lien claimant is someone "*having* a

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court properly held that LOTN paid RCG the amount required by arbitration on the contract claim. Therefore, the trial court did not err by holding that RCG "cannot be deemed to be a prevailing lien claimant in this matter."

[23] MCL 570.1105(2) (emphasis added).

[24] MCL 570.1118(2).

[25] MCL 570.1105(2) (emphasis added).

[26] MCL 570.1107(1). See also MCL 570.1115(2) ("A lien claimant who receives full payment for his or her contract shall provide to the owner, lessee, or designee a full unconditional waiver of lien."); *Bosch*, 100 Mich App at 297 ("[A] lienor is not required to accept tender of payment after a complaint has been filed *if he wishes to pursue his statutory right to attorney fees*.") (emphasis added).

[27] MCL 570.1118(2) (emphasis added).

right to a construction lien . . . ."[28] This is the Achilles' heel of the majority opinion, one it attempts to conceal by holding that a trial court can order a hearing after a purported lien claimant files a motion for attorney fees and make factual findings on all elements of the party's lien claim at that later time.[29] The majority opinion transforms the statutory requirement for the adjudication of a *present right* to a lien to a mere theoretical right. Even if a trial court could resolve whether the lien claim was valid in some cases in which the lien claimant has not extinguished its lien claim, the majority's proposal cannot apply in this case. As noted, RCG had already accepted full payment from LOTN *before* it moved for attorney fees or confirmation of the arbitration award. Thus, as the trial court properly held, by the time the motion was filed, RCG had extinguished any right it had to a lien and could not honestly contend that it was then a lien claimant.[30] By that time, RCG simply could not validly

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[28] MCL 570.1105(2) (emphasis added).

[29] *Ante* at 554 n 22. In the instant case, the majority offers that such a hearing could have been held when RCG moved for confirmation of the arbitration award. Unfortunately for the majority position, that is not what happened below. Further, the majority opinion's proposal for curing its Achilles' heel problem completely contradicts the majority's own description of what a confirmation of award proceeding *is*. See *ante* at 565 n 65, quoting 6 CJS, Arbitration, § 181, p 248 (2004) ("Confirmation is a *summary* proceeding where the court *merely* converts an arbitration award into a final judgment.") (emphasis added).

[30] This is not to say that an alleged lien claimant will always have to reject payment of an award to recover attorney fees. In fact, in the typical case brought under the CLA, the lien claimant will necessarily have been adjudicated a "lien claimant" under the CLA when it prevails. The majority fails to give any meaning to the defined term "lien claimant," which requires that the claimant be a person "*having* a right" to a lien, MCL 570.1105(2), at the time it "prevail[s]," MCL 570.1118(2). Those provisions require an adjudication that the majority now holds can happen *after* the right to a lien has been extinguished, not before. If

contend that it "ha[d] a right to a construction lien under"[31] the CLA. For the majority, this is a matter of indifference.

The majority opinion could have stopped as soon as it recognized that *this* plaintiff had no legal basis for asserting a valid right to a lien by the time RCG actually moved to confirm the arbitration award, much less when it moved to recover attorney fees. Nonetheless, the majority opinion goes even further, creating a remedy that the plain language of the CLA precludes and that cannot apply to RCG on the facts of this case.

At no point does the majority opinion contradict the proposition that, under the CLA and our caselaw, acceptance of full payment extinguishes a lien. Because it does not address this fundamental principle concerning liens and ignores that the CLA dictates that one cannot have a lien for more than is owed,[32] the majority is obligated to deflect the reader's attention to other matters. The majority expends a lot of effort to avoid recognizing that RCG never had—and could not have—a valid lien after it accepted full payment of the arbitration award and without a prior adjudication of its right to a lien:

> Further, that the trial court never entered a judgment confirming the arbitration award does not preclude us from determining that RCG was the prevailing party. The lack of judicial imprimatur in RCG's favor is a direct result of the trial court's failure to confirm RCG's arbitration award upon its motion. Contrary to the trial court's conclusion, LOTN's payment of the arbitration award did

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a putative lien claimant attempts to recover attorney fees on a now-satisfied, never-adjudicated lien claim, the prior acceptance of judgment satisfying the lien extinguishes both the lien, MCL 570.1107(1), and any claim to attorney fees under the act, MCL 570.1118(2).

[31] MCL 570.1105(2).

[32] MCL 570.1107(1).

> not obviate the need to confirm the award. In certain circumstances, confirmation may be necessary, even if the award has been satisfied. For instance, the winning party at arbitration may desire to seek costs. Or, as in the instant case, a party may wish to seek attorney fees. Although Michigan courts have not spoken on the issue, we agree with a number of other courts that a party cannot avoid confirmation by paying an arbitration award before the confirmation proceeding. Therefore, LOTN's payment of the arbitration award should not have precluded the trial court from providing the necessary judicial imprimatur in this case by confirming the award.[33]

None of the foregoing statements about the necessity of confirmation of an arbitration award addresses why a party that has extinguished its lien by accepting full payment is nevertheless a party that has a present right to a lien. Instead, the majority opinion shifts to talk about the validity of the confirmation of the arbitration award, rather than the validity of the underlying lien.

The majority suggests that only its interpretive gobbledygook can prevent what it considers the gamesmanship of a party's acceptance or rejection of payment:

> Finally, we disagree with the dissent's interpretation of the statute, which would require RCG to refuse the proffered payment and continue to litigate its foreclosure claim to remain eligible to seek attorney fees under [MCL 570.1118(2)]. Such a conclusion would encourage gamesmanship by defendants, allowing them to prolong litigation and delay payment on the contract claim in an attempt to drain the lien claimant's resources before it can obtain a judgment on its lien claim and seek attorney fees. It also directly contravenes this Court's policy of encouraging settlements and discouraging litigation. Therefore,

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[33] *Ante* at 564-566 (citations omitted).

> we instead conclude that RCG's acceptance of payment did not preclude it from seeking attorney fees.[34]

The majority opinion's purpose-driven, not textual, argument ignores the underlying problem with its remedy in this case and shifts the discussion to what it sees as the opportunity for "gamesmanship" available to defendants under my construction of the CLA.[35] Whether the legal consequences of having to choose to accept full payment or seek a judicial determination regarding the validity of RCG's lien imposes a cost can be characterized as promoting gamesmanship, the majority opinion has wholly ignored one requirement of a lien claim on which CLA attorney fees necessarily must be predicated—that there is some construction contract payment *owed* to the lien claimant.[36] Settlements do sometimes require parties to choose among options, and sometimes selecting one may preclude complete optimization of the party's preferred outcome. If none of the options is sufficiently acceptable, a party may opt to have someone adjudicate the dispute. RCG chose to accept full payment with full awareness that doing so might jeopardize its claim for CLA attorney fees.[37]

Apart from the fact that the majority opinion creates a remedy that RCG cannot legally receive, arguably the most startling thing about the majority opinion is that it takes a statutory framework called the "construction lien act"[38] and turns it into a vehicle for

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[34] *Ante* at 566-567 (citations omitted).

[35] *Ante* at 566.

[36] MCL 570.1107(1).

[37] See note 3 of this opinion.

[38] MCL 570.1101. Again, the CLA was intended to "establish, protect, and enforce *by lien* the rights of persons performing labor or providing material or equipment for the improvement of real property; to provide

attorney fees wholly divorced from success on the specific lien foreclosure action that this statutory scheme creates and defines. It is by delinking the entitlement to CLA attorney fees from success on the lien foreclosure action that the majority opinion creates a second problem: How does one draw the line on which ancillary claims create an entitlement to attorney fees and which do not? This is an exquisitely difficult question for the majority to answer because both the CLA and our court rules provide permission to join ancillary claims to the lien foreclosure claims.[39] Once success on the *lien* claim is no longer the necessary precondition to an attorney fees award under the CLA, unless success on most ancillary claims can be eliminated as a trigger for attorney fees, the majority allows a very expansive holding in favor of a general right to attorney fees on *any* claim brought with a construction lien foreclosure claim.

To avoid triggering attorney fees through success on any and all ancillary claims, the majority devises a new rule: success on contract claims alone is a trigger for the recovery of attorney fees under the CLA. The majority adopts this rule because it believes that the only thing the CLA requires as a precondition to an award of attorney fees is recovery on a claim "integrally related" to the CLA claim.[40]

Presumably, had the Legislature been content with the majority's broader approach to a contract-based recovery of attorney fees for claims of unpaid construction debts, it would not have bothered with enacting

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for defenses to *construction liens*; [and] to provide remedies and prescribe penalties . . . ." 1980 PA 497, title, as amended by 2010 PA 147 (emphasis added).

[39] MCL 570.1117(5); MCL 570.1118(2); MCR 2.203(A); MCR 2.203(B).

[40] *Ante* at 564 n 63.

the CLA's exacting *lien foreclosure* process, which requires recording a lien within a prescribed time frame, among other obligations. Indeed, at common law, a contractor always had a *contract* claim for any unpaid bills but no entitlement to attorney fees. So, the effect of the majority's construction of the CLA is to undercut the lien foreclosure statutory process and attorney fees remedy entirely to permit the recovery of attorney fees based on a simple common-law contract claim.

That strikes me as a surprising result. I think it doubtful that the Legislature created an unnecessary lien foreclosure process with the intention of establishing a new route to recover attorney fees for an existing common-law contract claim—particularly when the Legislature went so far to create a statutory regime that repeatedly highlights that the *prevailing foreclosure lien claimant* is eligible for recovery of attorney fees. Should the Legislature decide to pass the Construction *Contract* Claim Act with a similar provision for attorney fees for construction contract claims, I will surely join the majority's conclusion that success on a contract claim suffices to allow such an award. Until then, I find the majority's construction untenable.

The great irony is that, in purporting to construe the CLA, the majority has converted a statutory attorney fees remedy requiring prevailing on a *lien foreclosure action* into one in which prevailing on the "main issue" of the lawsuit is sufficient. Very simply, there is no textual support for an attorney fees remedy under the CLA by " 'prevailing on the main issue . . . .' "[41] Of course, this extension of entitlement to statutory attorney fees to any ancillary claims, and the subsequent purported limitation to contract claims, finds no an-

[41] *Ante* at 563 (citation and quotation marks omitted).

chor in the actual text of the CLA; nor does the majority opinion explain how the "main issue" envisioned by a statute designed to establish *lien rights* for persons performing labor or providing material or equipment for the improvement of real property[42] is addressed by awarding attorney fees on a standard common-law contract claim. The majority opinion's rationale ignores both the actual text and *context* of the CLA. This is a remarkable, but not laudable, accomplishment for a court. The majority opinion gives primacy to what it perceives as the purpose of the legislative scheme at the expense of the statute's text. This Court abandoned that so-called approach to statutory construction almost twenty years ago, striving to achieve statutory constructions founded on the actual language of an act.[43]

The majority opinion justifies including contract claims and excluding other ancillary claims as a trigger for entitlement to attorney fees by asserting that lien claims and contract claims are "integrally related" to lien foreclosure actions. While I concede that a contract claim for labor or materials is logically related to a lien foreclosure action,[44] that conclusion does not explain why other ancillary claims are *less* "integrally related" to lien claims and, therefore, do not trigger an

[42] See 1980 PA 497, title, as amended by 2010 PA 147.

[43] "[W]hen reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute. It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000) (MARKMAN, J.) (citation omitted).

[44] See MCL 570.1107(1).

entitlement to attorney fees.[45] It is not surprising that the majority offers no additional explanation for its line drawing because its rationale is not tied to the text of the CLA. Once the connection between success on the lien foreclosure action and entitlement to attorney fees is broken, the majority is forced to draw an arbitrary line to make its expansion of entitlement to attorney fees appear to be more modest than it is.

Stunningly, what the majority opinion does today is exactly that which this Court rejected in *H A Smith Lumber & Hardware Co v Decina*.[46] Though it attempts to distinguish *Decina*, the majority's analysis fails either to make a legally significant distinction between that case and the instant dispute or provide a tenable construction of the statutory text. The lien claimants in both *Decina* and the instant appeal brought alternative claims—a CLA claim and a contract claim—for the same remedy. The trial courts in both *Decina* and this case granted relief on the basis of the contract claim. In *Decina*, whether accurate or not, the trial court actually stated that the plaintiffs " 'each

[45] This problem is one that will surely arise in future litigation. The Michigan Court Rules require parties to join every claim the pleader has against an opposing party arising out of the transaction or occurrence that is the subject matter of the action. MCR 2.203(A). Further, like the CLA joinder provisions, "[a] pleader *may* join as either independent or alternate claims as many claims, legal or equitable, as the pleader has against an opposing party." MCR 2.203(B) (emphasis added). I fear the majority opinion will generate additional litigation over just how "integrally related" ancillary claims must be in order to recover attorney fees (e.g., "The general contractor ran over my toolbox, thereby increasing my cost of performance on this construction contract."). And, in fact, the majority explicitly notes that future litigation will be needed to determine future ancillary claims. See *ante* at 564.

[46] *H A Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007).

ha[d] valid claims of lien,' "[47] even though the liens did not attach to the construction property.[48] In the instant case, the trial court expressly stated, repeatedly, that neither it nor the arbitrator had ever adjudicated RCG's lien claim and held that RCG had extinguished its lien. Thus, the *Decina* lien claimants had an arguably stronger—though ultimately unsuccessful—argument that the trial court had actually adjudicated its lien claim than RCG does in the instant case.

At the time plaintiff accepted full payment, it could not plausibly argue that it "ha[d] a right to a construction lien under [the CLA],"[49] when no such *right* was ever determined to exist by the trial court. Interestingly, the majority has no problem calling RCG a "lien claimant,"[50] despite the fact that neither the trial court nor the arbitrator—the only fact-finding entities that have been involved in this case—ever made such a determination. It is axiomatic that this Court is not a fact-finding body. I believe that any finding that RCG meets all the requirements of a lien claimant is one that can only be made by the fact-finder, i.e., the trial court or the arbitrator, and in this case both expressly refused to do so.[51] Unexplained is how a *subsequent* hearing on attorney fees now ordered by the majority

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[47] *H A Smith Lumber & Hardware Co v Decina (On Remand)*, 265 Mich App 380, 382; 695 NW2d 347 (2005), rev'd 480 Mich 987 (2007).

[48] It is hard to imagine how one could have a valid claim of lien that never attaches to the property in question. Nevertheless, the lien claimants in *Decina* certainly did not prevail on the lien claims they alleged.

[49] MCL 570.1105(2).

[50] *Ante* at 554-558.

[51] In this case, as stated, the trial court *held* that RCG had *extinguished* its lien claim by accepting full payment. The majority opinion never bothers to explain why this holding is erroneous and must be overruled.

can revive RCG's lien, which it extinguished by accepting full payment. As a consequence, the majority opinion has ordered a futile act, disguising that it has abandoned the statute to create an attorney fees remedy the Legislature never contemplated.

IV. CONCLUSION

For the reasons stated, I do not believe that RCG is entitled to attorney fees. The attorney fees provision of the CLA only allows a trial court to award attorney fees "to a lien claimant who is the prevailing party."[52] Because RCG did not meet the statutory definition of "lien claimant" under the CLA, and because it voluntarily extinguished its lien claim before the trial court could have so determined, I do not believe RCG is entitled to attorney fees and would reverse the Court of Appeals on that issue. For these reasons, I dissent.

ZAHRA and LARSEN, JJ., concurred with YOUNG, C.J.

[52] MCL 570.1118(2).

HECHT v NATIONAL HERITAGE ACADEMIES, INC

Docket No. 150616. Argued March 10, 2016 (Calendar No. 3). Decided July 26, 2016.

Craig Hecht brought an action in the Genesee Circuit Court alleging that his employment was terminated by National Heritage Academies, Inc., in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. Plaintiff had been employed as a teacher by defendant when he made racially charged comments. When later questioned about the comments by his supervisors, plaintiff provided inconsistent explanations. Plaintiff also allegedly attempted to interfere with his supervisors' investigation of the incident by asking a witness to change his statement about what had happened. Plaintiff was subsequently terminated. Plaintiff asserted that his attempts to find new employment as a teacher were hampered by defendant's mandatory statutory disclosures to other schools of his record of unprofessional conduct. Before trial, defendant moved to preclude plaintiff from presenting evidence of the disclosures because the disclosures were required by MCL 380.1230b and a school employer that discloses information in good faith under the statute is immune from civil liability for the disclosure. The court, Geoffrey L. Neithercut, J., ruled that the evidence was admissible. Defendant moved for a directed verdict at the close of plaintiff's case in chief, arguing that this was a disparate-treatment discrimination case and plaintiff had not shown that any of defendant's other employees engaged in the same or similar conduct. The court denied the motion. The jury returned a verdict in favor of plaintiff, finding that he had proved that race was a factor in his termination, that he had shown $50,120 in past economic loss, and that he had shown $485,000 in future economic loss. Defendant moved for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur. The court denied the motion. The Court of Appeals, SERVITTO, P.J., and CAVANAGH, J. (WILDER, J., dissenting), affirmed in an unpublished opinion. The Supreme Court granted defendant's application for leave to appeal. 498 Mich 877 (2015).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, ZAHRA, MCCORMACK (as to Parts I, II, and III), VIVIANO, BERNSTEIN (as to Parts I, II, and III), and LARSEN, the Supreme Court *held*:

In light of the circumstantial evidence presented and all the inferences that could have been reasonably drawn from that evidence in favor of the jury's liability verdict, a reasonable jury could have concluded that defendant violated the CRA. However, because MCL 380.1230b afforded defendant complete immunity from civil liability flowing from the mandatory disclosures compelled by that statute, the trial court erred by allowing the jury to consider the disclosure evidence. Accordingly, the award of future damages had to be vacated and the case remanded for further proceedings.

1. When reviewing a motion for JNOV, an appellate court must construe all the evidence and the inferences arising from the evidence in the nonmoving party's favor. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. Under MCL 37.2202(1) of the CRA, an employer may not discharge or otherwise discriminate against an individual with respect to employment because of race. A claim under the CRA requires proof of "but for" causation. There are multiple ways to prove that a plaintiff was the victim of unlawful discrimination, including direct evidence of discrimination, i.e., evidence that proves impermissible discriminatory bias without additional inference or presumption. In this case, however, contrary to the conclusion of the Court of Appeals majority, defendant failed to present direct evidence of discrimination. One way of proving unlawful discrimination without direct evidence is by showing that the plaintiff was treated unequally to a similarly situated employee who did not have the characteristic protected under the CRA. Thus, an employer's differing treatment of employees who were similar to the plaintiff in all relevant respects, except for their race, can give rise to an inference of unlawful discrimination. In order for this type of evidence to give rise to such an inference, the similarly situated employee must be nearly identical to the plaintiff in all relevant respects. In this case, plaintiff presented a different kind of circumstantial evidence: circumstantial evidence that his employer considered his race in its decision to discharge him. Plaintiff argued that the black employees routinely engaged in racial banter, but were not disciplined. There were distinctions between the comments made by plaintiff and those made by defendant's black employees that, if credited by the jury, might have allowed the jury to find for defendant.

However, plaintiff presented additional evidence that defendant considered plaintiff's race in terminating him. Specifically, plaintiff also presented evidence that defendant's management employees were aware of and tolerated the unequal enforcement of defendant's stated zero-tolerance policy. The evidence, if believed, suggested that defendant's management employees prohibited negative stereotyping in the workplace except when negative stereotyping comments were made by defendant's black employees. The jury was thus shown the difference between defendant's policy in theory and its racially biased application. This was potent circumstantial evidence of defendant's allegedly racially biased decision-making. This evidence could have allowed a reasonable jury to conclude that defendant applied a different standard to plaintiff's conduct based on his race. Accordingly, the jury could reasonably have found that race was a "but for" cause in defendant's decision to investigate plaintiff and escalate punishment for his racial comments. Similarly, while defendant presented nondiscriminatory reasons for its decision to terminate plaintiff, plaintiff presented sufficient evidence for a reasonable juror to reject those race-neutral reasons as unbelievable. The jury's verdict, finding a violation of the CRA, was supported by the totality of the evidence presented and the reasonable inferences in plaintiff's favor that could be drawn from that evidence.

2. Generally, all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the state of Michigan, the rules of evidence, or other rules adopted by the Supreme Court. Evidence may also be prohibited by statute. MCL 380.1230b provides that before hiring an applicant for employment, school employers must request that the applicant sign a statement (1) authorizing the applicant's current or former employer or employers to disclose to the school employer any unprofessional conduct by the applicant, and (2) releasing the current or former employer from any liability for providing that information. Before hiring an applicant for employment, a school employer must request that the applicant's current or prior employer provide information concerning the applicant's unprofessional conduct, if any. After receiving such a request, a school employer must provide the information requested and make available to the requesting school employer copies of all documents in the employee's personnel record relating to the unprofessional conduct. A school employer that discloses information in good faith under the statute is immune from civil liability for the disclosure. In this case, plaintiff argued that he was not precluded from presenting evidence of the mandatory disclosure because he did not sue for the disclosure itself—he

sued for a violation of the CRA and presented evidence of the adverse impact of the disclosure to establish future damages. Plaintiff's belief was that only a direct action for the disclosure, e.g., a defamation claim, was precluded by MCL 380.1230b(3), but the admission of evidence of the disclosures in a case such as this was permissible. The term "civil liability" is defined as being legally obligated for civil damages. The trial court's decision to admit evidence and argument regarding the mandatory disclosures for the purpose of assessing damages allowed the jury to impose against defendant legal obligations arising from the disclosure. This violated the plain language of the statute. There can be no damages without liability. A legislative decision to preclude liability necessarily precludes damages on the same basis. There is no textual support for the view that immunity under the statute depends on the nature of the claim underlying the civil liability. The improper admission of the disclosure evidence tainted the jury's future damages award, which had to be vacated.

Court of Appeals judgment is affirmed to the extent it held that plaintiff presented sufficient circumstantial evidence to sustain the jury's verdict finding that defendant violated the CRA; Court of Appeals judgment is reversed to the extent it held that the trial court properly admitted evidence of defendant's mandatory disclosures of plaintiff's unprofessional conduct; jury award of future damages is vacated; case is remanded to the trial court for further proceedings.

Justice MCCORMACK, joined by Justice BERNSTEIN, concurring in part and dissenting in part, agreed with the majority that plaintiff presented sufficient evidence of discrimination such that the trial court did not err by denying defendant's motion for JNOV, but disagreed with the majority's decision to vacate the jury award for future damages. MCL 380.1230b(3) confers immunity from liability, i.e., the state of being legally obligated for damages, "for the disclosure," not from paying money as compensation for a state of legal responsibility unrelated to the disclosure. Because the statutory immunity is tied to the liability and not the remedy, MCL 380.1230b(3) only precludes imposing liability (and damages flowing therefrom) on a defendant when the liability arises from an injury caused by the disclosure itself. Disclosing plaintiff's unprofessional conduct did not create additional legal responsibility for which defendant was on the hook; rather, it was the alleged illegal act of discharging plaintiff based on his race that gave rise to defendant's liability. The injury from which the liability arose was the discriminatory discharge, not

the disclosures. Introducing evidence of defendant's disclosures of plaintiff's conduct merely assisted the jury in determining the appropriate remedy for the discriminatory discharge. Because plaintiff's injury was the discriminatory discharge rather than defendant's disclosures, and because it was the discriminatory discharge for which defendant was held liable, the future damages award did not constitute civil liability for the disclosure, and the award of future damages should have been affirmed.

1. ACTIONS — VIOLATIONS OF THE CIVIL RIGHTS ACT — SUFFICIENCY OF THE EVIDENCE — CAUSATION.

Under MCL 37.2202(1) of the Civil Rights Act, an employer may not discharge or otherwise discriminate against an individual with respect to employment because of race; a claim under the act requires proof of "but for" causation; there are multiple ways to prove that a plaintiff was the victim of unlawful discrimination, including through proofs of either direct or circumstantial evidence of discrimination.

2. SCHOOLS — DISCLOSURES OF UNPROFESSIONAL CONDUCT — IMMUNITY FROM CIVIL LIABILITY FOR DISCLOSURES — INADMISSIBILITY OF EVIDENCE OF DISCLOSURES TO ASSESS DAMAGES IN A DISCRIMINATION CASE.

Under MCL 380.1230b, before hiring an applicant for employment a school employer must request that the applicant's current or prior employer provide information concerning the applicant's unprofessional conduct, if any; after receiving such a request, a school employer must provide the information requested and make available to the requesting school employer copies of all documents in the employee's personnel record relating to the unprofessional conduct; a school employer that discloses information in good faith under the statute is immune from civil liability for the disclosure; evidence of such a disclosure is not admissible for the purpose of assessing the plaintiff's damages arising out of the disclosure in a case brought by a plaintiff alleging that he or she was fired in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq*.

Law Office of Glen N. Lenhoff (by *Glen N. Lenhoff* and *Robert D. Kent-Bryant*) and *Rizik & Rizik, PC* (by *Michael B. Rizik, Jr.*), for plaintiff.

Warner Norcross & Judd LLP (by *John J. Bursch*, *Dean F. Pacific*, and *Matthew T. Nelson*) for defendant.

Amici Curiae:

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Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Paul D. Hudson*, and *Brian M. Schwartz*), for the Michigan Manufacturers Association.

YOUNG, C.J. In this race discrimination case, we must decide whether the trial court erred by denying defendant's motion for judgment notwithstanding the verdict (JNOV) and determine the propriety of the admission of evidence of defendant's mandatory reporting under MCL 380.1230b. We hold that the Court of Appeals did not err by affirming the trial court's denial of defendant's motion for JNOV on plaintiff's claim of discrimination under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Contrary to the Court of Appeals, we conclude that there was no direct evidence of discriminatory animus concerning the firing of plaintiff. This case turned on circumstantial evidence—on the credibility of plaintiff's proofs that suggested there were racial reasons for his treatment and on the credibility of defendant's nonracial justifications for firing him. We conclude, based on the evidence presented and all the inferences that could be reasonably drawn from that evidence in favor of the jury's liability verdict, that a reasonable jury could have concluded that defendant violated the CRA.

Finally, because MCL 380.1230b afforded defendant complete immunity from civil liability flowing from the

mandatory disclosures compelled by this statute, we hold that the trial court erred by allowing the jury to consider evidence of defendant's statutorily mandated disclosures of plaintiff's wrongdoing to other schools, and the Court of Appeals erred by affirming the trial court's decision in that regard.

For these reasons, we reverse in part and affirm in part the judgment of the Court of Appeals, vacate the jury award for future damages, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant, National Heritage Academies, Inc., is a company that owns and operates a number of public, independently operated schools, including Linden Charter Academy (LCA) located in Flint, Michigan. The student body at LCA is predominantly black. Plaintiff, Craig Hecht, is a white teacher who had been employed by defendant at LCA for approximately eight years, most recently serving as a third-grade teacher.

We draw from the evidence adduced at trial the following narrative concerning the events that led to plaintiff's termination. On November 3, 2009, Lisa Code, a white library aide at LCA, entered plaintiff's classroom during class time to return a computer table she had borrowed. Upon her arrival, however, Code realized that she had brought back the wrong table—the one she borrowed was white, whereas the one she returned was brown. Noting her error, Code asked plaintiff if he would prefer to have a white table, like the one she borrowed, or the brown one she had returned. Plaintiff responded, "[Y]ou know I want a white table, white tables are better." He continued,

"[W]e can take all these brown tables and we can burn the brown tables." Also present for this exchange was Floyd Bell, a black paraprofessional assigned to plaintiff's classroom. After hearing plaintiff's comments, Bell and Code both "called a foul" on plaintiff, in accordance with the school's informal procedures for addressing inappropriate personal conduct.[1] Plaintiff denied hearing either Bell or Code call a foul on him, but later acknowledged that his comments were meant to imply that "white" people are better than "brown" people.

Later that same day, Code reported the incident to Corrine Weaver, the dean of LCA. Weaver, in turn, reported the incident to her supervisor, Linda Caine-Smith,[2] the principal of LCA, who initiated an investigation. Caine-Smith and Weaver each separately interviewed plaintiff, Bell, and Code and took written statements from all three. Although Code's testimony at trial emphasized that plaintiff made the statements in front of a child, plaintiff's counsel also elicited testimony from Code that her November 4th written statement did not include that allegation.[3]

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[1] The Court of Appeals opinion explained the meaning of "fouls" within defendant's professional conduct guidelines:

> LCA employees created a "social contract" with each other, such that if an individual stated something that someone else found offensive or inappropriate, the person offended was to "call a foul" on the speaker. In response, the speaker was to give two "ups" to the person who called the foul, which are positive statements about the person. In this instance, Plaintiff testified that he did not give any "ups" to either Bell or Code because he did not hear any foul called. [*Hecht v Nat'l Heritage Academies, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2014 (Docket No. 306870), p 1 n 1.]

[2] Weaver and Caine-Smith are both white.

[3] [*Plaintiff's Counsel*]: Where do you say [in your written statement] that Mr. Hecht said something to a child?

When questioned, plaintiff provided varying explanations regarding what had happened. At first, plaintiff confirmed to Weaver the general discussion about white and brown tables, but he denied that he meant anything racial by his statements. The following day, plaintiff told Caine-Smith that he never said "brown should burn." However, later that day, plaintiff sent Caine-Smith a written statement in which he admitted to saying, "white tables are better than brown tables" and "all brown tables should burn." He also admitted that he involved a third-grade student in the "jok[e]" after he made the comments. Plaintiff subsequently met with Bell, apologized to him, and shook his hand.

At this point in the investigation, Caine-Smith contacted Courtney Unwin, defendant's employee relations manager, to discuss plaintiff's conduct and Caine-Smith's belief that plaintiff had lied during their initial conversation regarding the incident. Unwin then spoke directly to plaintiff, who, despite the admissions made in his earlier written statement, told her that his remark was simply a "tasteless joke," denied involving a student in the joke, and claimed that none of his

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[*Code*]: I didn't, but then it must be—

[*Plaintiff's Counsel*]: Oh, you testified today that Mr. Hecht said to a child, the whites—brown should burn, white's better. That's what you said today. But on November 4th, you didn't say that, did you?

[*Code*]: No, I didn't include that.

[*Plaintiff's Counsel*]: You didn't refer to communication is with children at all, did ya?

[*Code*]: No, not in this.

[*Plaintiff's Counsel*]: You didn't even state in here that a child had heard what Mr. Hecht said, correct?

[*Code*]: Right. Correct.

students heard the exchange. Unwin also claimed that plaintiff called her later that day, stated that he could not even remember saying anything about brown tables burning, and then justified his conduct by reference to racial banter he suggested was regularly engaged in by black teachers at LCA. Plaintiff claimed that he told Unwin he was just kidding around, that similar joking happened all the time at the school, and that he would do anything to make it better.

Caine-Smith and Unwin met to discuss plaintiff's comments in the classroom and his versions of the incident. They discussed several disciplinary options, including a final written warning and termination. After that meeting, Caine-Smith called plaintiff to her office and told him he was being placed on immediate leave pending further investigation. Instead of leaving the building, plaintiff went into a room in which Bell was tutoring students. Plaintiff asked the students to leave the room so that he and Bell could speak privately. He then asked Bell to change the statement he gave defendant. Bell declined the request and explained that he would not lie for plaintiff.[4]

Plaintiff also tried to contact Code by calling both her home and cellular phones. Code did not answer either call, but plaintiff left a voicemail stating that he was "desperate" to speak to her. Code testified that

[4] On cross-examination, Bell testified that the only way to change his statement would be to "mak[e] it a lie." Nevertheless, Bell acknowledged that Hecht had apologized and that Bell had not included the apology in his statement, because he "didn't think it was sincere . . . ." Bell admitted it was his *opinion* that plaintiff had asked him to lie and that plaintiff did not explicitly ask him to lie. Plaintiff's counsel later argued to the jury that this evidence showed that plaintiff merely wanted Bell to include in his statement that plaintiff had apologized to him, not that plaintiff wanted Bell to lie.

plaintiff had never before tried to contact her. Code further testified that plaintiff never asked her to change her statement.

The following day, Bell told Caine-Smith that plaintiff had asked him to lie. After receiving this information, Caine-Smith worried that plaintiff had similarly contacted Code. When asked, Code told Caine-Smith about the voicemail, causing Caine-Smith to consult with Unwin again. After their discussion, both Caine-Smith and Unwin determined that plaintiff was interfering with the investigation, and they decided to terminate plaintiff's employment. Notably, while Unwin testified that she believed plaintiff's intent was for Bell to lie, plaintiff's counsel called attention to Unwin's arguably contrary deposition testimony, in which she had previously testified that, to her knowledge, plaintiff did not ask anyone to lie.[5] Plaintiff's employment was terminated that day. Subsequently, plaintiff was replaced by a white woman hired by defendant.

After being fired from LCA, plaintiff began taking substitute teaching jobs, while simultaneously applying for long-term, full-time employment as a teacher. Plaintiff testified that every time he got close to securing such employment, the prospective employer would request his employment record from defendant, as required by law,[6] and, also as required by law,[7] defen-

[5] When asked if plaintiff did anything to Code to obstruct the investigation, she answered, "Not to me, no."

[6] See MCL 380.1230b(2) ("Before hiring an applicant for employment, a school district, local act school district, public school academy, intermediate school district, or nonpublic school *shall* request at least the applicant's current employer or, if the applicant is not currently employed, the applicant's immediately previous employer to provide the information described in [MCL 380.1230b(1)(a), regarding unprofessional conduct], if any.") (emphasis added).

[7] MCL 380.1230b(3) ("Not later than 20 business days after receiving

dant disclosed the fact that plaintiff was fired for his racially insensitive comments and his conduct during the investigation. Plaintiff testified that, because of these disclosures, he was unable to obtain full-time employment as a teacher. Plaintiff eventually obtained a nonteaching job as a machine operator, making approximately $14 per hour—considerably less than his salary with defendant.[8]

In February 2010, plaintiff filed a complaint in the Genesee Circuit Court, alleging that defendant terminated his employment based on his race in violation of the CRA. Defendant moved for summary disposition, arguing, among other things, that it had legitimate nondiscriminatory reasons for firing plaintiff and that his misconduct was not "similar" to that of any other employee. The motion was denied by the trial court. Defendant does not challenge the denial of summary disposition in this appeal.

Before trial, defendant moved, in limine, to preclude plaintiff from presenting evidence of its mandatory disclosure of plaintiff's unprofessional conduct to other schools. Defendant argued that the disclosures were

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a request under subsection (2), an employer *shall* provide the information requested and make available to the requesting school district, local act school district, public school academy, intermediate school district, or nonpublic school copies of all documents in the employee's personnel record relating to the unprofessional conduct.") (emphasis added).

[8] At trial, there was conflicting testimony regarding plaintiff's claim that he was denied subsequent teaching employment solely or predominantly because of the statutorily mandated disclosure of his "unprofessional conduct." In fact, during cross-examination, plaintiff admitted that he likely would have obtained a position as a long-term substitute teacher had he not failed a drug test because it revealed the presence of unprescribed pain medication he received from his mother-in-law. Regardless of the actual cause of his difficulty in finding a teaching job, evidence of the statutorily mandated disclosures was presented to the jury as a cause of plaintiff's inability to obtain a teaching position.

required by law, pursuant to MCL 380.1230b, and that the same statutory provision immunized the disclosing school from civil liability for the disclosures. On this basis, defendant argued that plaintiff should be precluded from admitting these disclosures or other information related to them as evidence to establish civil liability.

Plaintiff countered, arguing that the statute only shielded defendant from *liability* stemming *directly from the disclosure*, such as when a plaintiff sues for defamation. Plaintiff claimed that he was seeking to use the disclosures for a different purpose: not to establish liability for defamation, but to establish his *future damages* resulting from the alleged employment discrimination because the disclosures to prospective school employers precluded him from obtaining another teaching position. The trial court ruled that it would not limit the presentation of this disclosure evidence at trial, but it would consider jury instructions explaining the ways in which the evidence could be used.

At trial, plaintiff attempted to prove his CRA claim by establishing that the defendant applied different rules to white and black employees who engaged in racial banter: black employees were permitted to engage in such conduct without being reported or investigated, while plaintiff, a white employee, was subject to disciplinary investigation and escalation of punishment. Several witnesses testified about this issue.

One of these witnesses, Unwin, the LCA employee relations manager who was consulted on what course of action should be taken with plaintiff because of his racial comments and subsequent conduct during the investigation of those comments, testified that LCA had essentially a "zero tolerance" policy prohibiting

any expression of negative racial "stereotyping" in the workplace. Under the LCA antidiscrimination policy, it was mandatory that any such racial remarks be reported and investigated.

The testimony of defendant's other managers involved in investigating and disciplining plaintiff permitted the jury to reach the conclusion that defendant's policy was applied differently depending on the race of the employee involved. Weaver testified that, a few days before plaintiff was fired, she reminded her supervisor, Caine-Smith, that racial banter happens among black employees without consequence. Weaver testified that Caine-Smith acknowledged that fact and acquiesced in the differential racial application of the policy. By contrast, Caine-Smith, on cross-examination, contradicted Weaver, testifying that she never had this conversation with Weaver.

Additionally, Weaver testified about other instances of "racial banter" that had occurred at LCA in which she was the target of negative racial stereotyping comments from black employees. Weaver recalled that one time, Tim Jones, a black employee at LCA, made a negative racially stereotyping remark to her. This incident occurred when approximately 70 to 75 teachers and employees of defendant were on a bus ride back from a professional development meeting. Weaver stated that she was going to make fried pork chops for dinner, and Tim Jones responded by asking, " '[W]hy would you be making pork chops; you're white?' " Weaver did not report the incident, but testified that she called a foul on Jones. He faced no formal discipline for his comment.

Weaver also testified about an incident involving Kevelin Jones, another black employee of defendant. Weaver testified, "Well there was one time we had the

Black History month and did the soul food thing; and Mr. [Kevelin] Jones made a comment to me about not eating it because I was white[.]" Weaver testified that she called a foul on Kevelin Jones, but that he also received no other punishment for his racial comment. Additionally, Weaver noted that she heard the " 'n' word" used by defendant's employees "[a] couple of times," and racial banter occurred regularly among her coworkers. None of this behavior resulted in reporting, investigation, or discipline. Moreover, Weaver admitted during questioning by plaintiff's counsel, as well as in her written statement, that she did not think plaintiff meant his comment to be racist. In addition, Weaver testified that when she first heard of the comment reported by Code, she also thought that it must have been a joke.

Plaintiff also testified during his case in chief and noted two additional instances of inappropriate racial commentary by black employees in the workplace. The first instance involved a black secretary at LCA, who called a student to accompany her by yelling, " 'hey, come here light skinned.' " The other instance involved a black employee stating that a school mural of the children's cartoon character "Dora the Explorer" should be named " 'Laquisha,' " not " 'Dora,' " because the paint color used for her skin was so dark.

Plaintiff then testified regarding his postterminination difficulty in finding teaching employment. He noted that he had obtained long-term substitute teaching positions, but every time the school "caught wind" of the details of his firing because of the mandatory disclosure form defendant sent to each school, he was quickly let go.

At the conclusion of plaintiff's case in chief, defendant moved for a directed verdict, arguing that plaintiff had

not shown that any other LCA teacher, or even any of defendant's employees, ever engaged in the same or similar conduct. In fact, defendant argued, plaintiff even admitted that he was aware of no other instance of a teacher making a racial or racist remark in a classroom in the presence of children. Plaintiff responded by noting the testimony showing black employees made racial jokes but faced no discipline whatsoever. Plaintiff also cited the statement attributed to Caine-Smith regarding the rules about racial banter being different for black employees. Defendant repeated that the only instances of racial conduct that plaintiff could point to did not occur in front of children, and, therefore, plaintiff was not similarly situated to those employees. The trial court agreed with plaintiff and held that there were "a whole bunch of similarly situated educators" and, taking the evidence in the light most favorable to the nonmoving party, denied defendant's motion.[9]

Plaintiff then argued as follows in closing:

> This man and his little family have groaned with the anguish of what happened here. *Every time he tries to get on his feet, they kick him back down again with these* [*mandatory disclosures*]. Every time he gets on his feet, they kick him back down. *He gets a substitute teaching job at Flushing; and, after a short time there, they knock on his door and tell him, you can't teach here any more because of the* [*mandatory disclosure*]*, what it said about you; you can't teach here any more*.[10]

After deliberating, the jury returned a verdict in favor of plaintiff. On the verdict form, the jury found

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[9] As discussed later in this opinion, defendant did not adequately present the issue of the trial court's denial of its motion for directed verdict in the Court of Appeals and, thus, failed to preserve the issue for review by this Court.

[10] Emphasis added.

that plaintiff had proved that race was a factor in his termination and that plaintiff had shown $50,120 in past economic loss and $485,000 in future economic loss. The jury also found that plaintiff suffered emotional distress caused by his termination, but awarded nothing on that claim.

Shortly thereafter, defendant filed a motion for JNOV, a new trial, or remittitur. In its motion for JNOV, defendant asserted that plaintiff failed to present sufficient evidence to support his claim under the CRA. Defendant also argued that it was entitled to a new trial because the admission of evidence of the mandatory disclosures, despite the immunity granted by law, was inconsistent with substantial justice and that the jury's verdict for future damages was unsupported by the evidence presented at trial. The trial court denied defendant's motion.

Defendant appealed in the Court of Appeals, which affirmed the trial court judgment in a split, unpublished opinion.[11] The majority held that plaintiff had presented sufficient direct evidence of discrimination in the form of Caine-Smith's statement to Weaver.[12] Additionally, the majority held that the *McDonnell Douglas*[13] burden-shifting approach is inapplicable on appellate review, not only where, as here, direct evidence is offered, but also in general once the matter has been decided by a jury.[14] The majority further held that, even if *McDonnell Douglas* were applicable,

[11] *Hecht*, unpub op at 1.

[12] *Id*. at 3-5. The panel relied on testimony from Weaver's deposition that was read into the record at trial. There was actually stronger testimony by Weaver, which we use in this opinion, that the Court of Appeals panel overlooked.

[13] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[14] *Hecht*, unpub op at 5.

plaintiff had presented sufficient circumstantial evidence to prevail under the *McDonnell Douglas* framework.[15] Finally, the majority held that the trial court did not err by allowing the presentation of evidence of defendant's mandatory disclosures to the jury.[16]

In dissent, Judge WILDER would have held that plaintiff failed to present any direct evidence of discrimination.[17] The majority and dissent differed in their understanding of a critical portion of Weaver's testimony. In that testimony, Weaver stated that Caine-Smith conveyed a message with the " 'point . . . that [racial banter] happens amongst African Americans and it's not the other way around[.]' " The dissent rejected the majority position that this statement was direct evidence of discrimination because it required an inference to prove the existence of Caine-Smith's discriminatory intent, and it could plausibly be interpreted as either discriminatory or benign.[18] The dissent also would have concluded that plaintiff could not prove a circumstantial case of discrimination because, even assuming plaintiff could establish a prima facie case as required by *McDonnell Douglas*, defendant clearly rebutted the inference of discrimination with legitimate reasons for plaintiff's discharge from employment.[19]

Defendant filed an application for leave to appeal the Court of Appeals decision. This Court granted leave to appeal, asking the parties to address

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[15] *Id*. at 6-7. The Court of Appeals determined that plaintiff had presented sufficient evidence that he was treated differently than black employees who had made racial remarks, but were not punished. *Id*.

[16] *Id*. at 7-9.

[17] *Id*. (WILDER, J., dissenting), at 2.

[18] *Id*. at 2-5.

[19] *Id*. at 5-6. The dissent did not address MCL 380.1230b.

whether the Court of Appeals erred: (1) when it found sufficient direct evidence of racial discrimination on the basis of a witness's interpretation or understanding of what the defendant's representative said to her; (2) when it concluded that the burden-shifting analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), was not applicable and that there was sufficient circumstantial evidence that the plaintiff was similarly situated to African-American employees who had made race-based remarks in the past; and (3) when it held that the trial court did not abuse its discretion in admitting evidence of the defendant employer's disclosures, which were mandated by MCL 380.1230b, to the plaintiff's prospective employers.[20]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decisions regarding motions for JNOV.[21] "The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted."[22] Issues relating to the admission of evidence are reviewed for an abuse of discretion.[23] An abuse of discretion generally occurs only when the trial court's decision is outside the range of reasonable and principled outcomes,[24] but a court also necessarily abuses its discretion by admitting evidence that is inadmissible as a matter of law.[25] Statutory

[20] *Hecht v Nat'l Heritage Academies, Inc*, 498 Mich 877 (2015).

[21] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003).

[22] *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

[23] *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

[24] *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[25] *Craig*, 471 Mich at 76.

interpretation is a question of law that we review de novo.[26]

III. CIVIL RIGHTS ACT

This Court must determine whether the trial court erred by denying defendant's motion for JNOV;[27] that is, we must determine whether plaintiff presented sufficient evidence to support a jury verdict finding employment discrimination. Again, in reviewing a motion for JNOV we must construe all evidence and inferences from the evidence in the nonmoving party's favor,[28] and, "[i]f reasonable jurors could have honestly

[26] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002).

[27] Despite defendant's current arguments before this Court regarding the trial court's denial of its motion for directed verdict, we agree with the Court of Appeals majority that defendant did not appeal in that Court the denial of its motion for directed verdict. The phrase "directed verdict" was mentioned only four times in defendant's Court of Appeals brief, and those references were cursory. These cursory statements did not adequately present for review the denial of the motion for directed verdict, particularly given that defendant filed its claim of appeal in the Court of Appeals "from the verdict returned on July 15, 2011, the Judgment entered on August 8, 2011, the Order Awarding Attorney Fees and Costs to Plaintiff entered on August 18, 2011, and the Order Denying Defendant's Motion [f]or JNOV, New Trial, or in the Alternative, Remittitur . . . ." This failure to mention the denial of its motion for directed verdict in its claim of appeal in the Court of Appeals was significant given the cursory references to the issue in defendant's Court of Appeals appellate brief. In its application for leave to appeal in this Court, defendant claims that it had "argued that the trial court erred by denying its motion for directed verdict and its JNOV motion." Defendant does not provide any support for this assertion beyond noting that the dissenting Court of Appeals judge "disagreed that [defendant] was not appealing the trial court's denial of its directed motion verdict [sic] in addition to the denial of its JNOV motion" and that "the standard of review for both was the same." This is insufficient to adequately present the directed verdict issue in this Court. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Because the issue is not properly before us, we will not address defendant's directed verdict claims.

[28] *Wilkinson*, 463 Mich at 391.

reached different conclusions, the jury verdict must stand."[29] To make this assessment, we must determine what a plaintiff is required to prove in an employment discrimination case.

MCL 37.2202(1) of the CRA provides:

> An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, *because of* . . . race . . . .[30]

The ultimate question in an employment discrimination case is whether the plaintiff was the victim of intentional discrimination.[31] In our caselaw, we have interpreted the CRA to require " 'but for causation' or 'causation in fact.' "[32] We reaffirm that construction here.

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[29] *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000). In other words, unless a plaintiff's case is wholly lacking evidence on an element of a claim, the jury is allowed to make reasonable inferences from the evidence and make credibility determinations. This is entirely consistent with our canon that credibility determinations lie solely with the trier of fact. See *Moll v Abbot Laboratories*, 444 Mich 1, 47; 506 NW2d 816 (1993) (LEVIN, J., dissenting) ("It is well settled as a matter of both Michigan and federal civil procedure that it is for the trier of fact, generally the jury, to decide where reasonable persons can draw different inferences from undisputed facts."); *Vandenberg v Prosek*, 335 Mich 382, 386; 56 NW2d 227 (1953) ("The weight that is to be given to the testimony of the witnesses is largely a matter to be left to the judgment of the jurors. While some of the witnesses' testimony, if believed, would indicate that plaintiff had been contributorily negligent, the jurors might give this testimony such credence as they found it should have, under the circumstances, and in view of testimony to the contrary as to the essential facts.").

[30] Emphasis added. "MCL 37.2202(1)(a) draws no distinctions between 'individual' plaintiffs on account of race." *Lind v Battle Creek*, 470 Mich 230, 232; 681 NW2d 334 (2004).

[31] *Reeves v Sanderson Plumbing Prod, Inc*, 530 US 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000).

[32] *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986).

There are multiple ways to prove that a plaintiff was the victim of unlawful discrimination. Direct evidence of intentional discrimination is a sure but rare method of challenging an employer's decision.[33] In this case, plaintiff did not have direct evidence of discrimination.[34] But there remain multiple ways of proving the

[33] The rarity of direct evidence in discrimination cases is one justification courts have offered for the creation of the *McDonnell Douglas* paradigm. See, e.g., *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) ("In many cases . . . no direct evidence of impermissible bias can be located."); *US Postal Serv Bd of Governors v Aikens*, 460 US 711, 716; 103 S Ct 1478; 75 L Ed 2d 403 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Kline v Tennessee Valley Auth*, 128 F3d 337, 348 (CA 6, 1997) ("It is the rare situation when direct evidence of discrimination is readily available, thus victims of employment discrimination are permitted to establish their cases through inferential and circumstantial proof.").

[34] Perhaps the best *general* definition of direct evidence is that it is evidence that proves impermissible discriminatory bias without additional inference or presumption. See *Hazle*, 464 Mich at 462. Nor did Caine-Smith's statement have all of the hallmarks that surrounded the statement in *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001)—a statement made by a decision-maker, to the plaintiff, at the meeting in which the plaintiff suffered the adverse employment decision, and evincing a causal nexus (stating the plaintiff was " 'getting *too old* for this s[***]' "). (Emphasis added.)

Whether Weaver's testimony about Caine-Smith's acknowledgement of the unequal application of defendant's antidiscrimination workplace policies constituted direct evidence of discrimination was a point of major dispute between the Court of Appeals majority and dissent. The majority erred by relying on the wrong section of Weaver's testimony, wherein Weaver seemed to be speculating about Caine-Smith's view that it was acceptable to give black employees engaging in prohibited racial banter a pass under defendant's antidiscrimination policies. Weaver testified that she *thought* Caine-Smith's " 'point was that it happens amongst African Americans and it's not the other way around; and that this one was reported. Someone was offended and we had an obligation to follow up on it.' " That kind of speculative testimony about motivation may be circumstantial evidence, but it is never direct evidence of motivation because, as Judge WILDER explained in his dissent, Weaver's testimony about what *she believed* Caine-Smith *meant* "is not direct evidence of discrimination because it did not recount an

ultimate question of discrimination in a circumstantial evidence case.[35] A plaintiff can attempt to prove discrimination by showing that the plaintiff was treated unequally to a similarly situated employee who did not have the protected characteristic.[36] An employer's differing treatment of employees who were similar to the plaintiff in all relevant respects, except for their race, can give rise to an inference of unlawful discrimination.[37] In order for this type of "similarly situated" evidence alone to give rise to such an inference, however, our cases have held that the "comparable" employees must be "nearly identical" to the plaintiff in all relevant respects.[38]

Plaintiff argues that he was treated differently than similarly situated black employees at the school. He argues that the black employees routinely engaged in racial banter, but were not disciplined. Yet he was fired for what he claims is nearly identical conduct—telling

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actual statement by Caine-Smith." *Hecht* (WILDER, J., dissenting), unpub op at 3. In other words, Weaver was merely making an *inference* about what Caine-Smith intended to convey to Weaver, but Caine-Smith's actual words were not provided to the jury in this exchange. To our knowledge, no court has accepted such speculative testimony as direct evidence of discrimination.

We conclude that even the Weaver testimony quoted later in this opinion (in which Weaver testified that Caine-Smith *said*, " 'It [the prohibited racial banter] happens among African-Americans and it's not the other way around' ") does not constitute direct evidence of racial bias. The Weaver testimony is, however, potent circumstantial evidence of the employer's potential racially biased decision-making, and ultimately, we conclude that there is sufficient *circumstantial* evidence to sustain this verdict.

[35] *Matras*, 424 Mich at 683-684.

[36] *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (opinion by BRICKLEY, J.).

[37] *Id*. at 695-696.

[38] *Id*. at 699-700.

a racially charged joke. If this were the entirety of plaintiff's case, we question whether it would be sufficient to sustain the verdict. Defendant points out several factors that arguably distinguish plaintiff's conduct from that of other employees, notably that plaintiff's joke was told in a classroom full of students, which certainly raised the prospect that they might hear it, regardless of whether they actually did.

We need not decide this question, however, because the jury was not left with *only* this evidence from which to draw the inference that race was the "but for" cause of plaintiff's discharge. Defendant errs when it suggests that there are only two ways in which a plaintiff may meet its ultimate burden of demonstrating circumstances from which the fact-finder could conclude that race discrimination occurred: by proving that the plaintiff was replaced by a person of another race or by using the "similarly situated" method. A plaintiff is not so limited.

As stated earlier, during trial, the jury was presented with testimony from both Unwin and Caine-Smith about defendant's employee conduct practices. Caine-Smith testified that defendant's employee handbook precluded "inappropriate business conduct, which includes gambling, abusive profanity or threatening language, insubordination, *or violation of discrimination or harassment policy*, misuse of confidential information, conducting personal business during work time, excessive absenteeism or tardiness, *showing disrespect for co-workers*, improper use of [defendant's] technology or [defendant's other] resources."[39] Unwin noted that defendant also had a workplace harassment policy, which stated that defendant was "committed to providing a work environment that's free from dis-

[39] Emphasis added.

crimination and unlawful harassment." Prohibited forms of harassment included any "verbal or physical conduct that insults or shows hostility or aversion toward an individual because of his or her race or color or any other legally protected characteristic." She highlighted that examples of harassing conduct include, but are not limited to, "epithets, slurs, [and] negative stereotyping." Further, Unwin stated that the school's zero-tolerance policy required anyone who sees any such misconduct to "immediately notify [his or her] manager" and that "[a]nyone engaging in . . . unlawful harassment will be subject to . . . disciplinary action up to and including termination from employment."[40]

Thus, defendant provided a nondiscriminatory rationale for disciplining plaintiff: violation of the school's employment policies. Despite these exacting rules dictating how harassing speech and negative racial stereotyping comments must be handled under defendant's policies, the jury was also presented with evidence that the rules were not strictly applied to black employees engaged in such prohibited conduct. Weaver, herself, testified that she was the subject of racial banter that could easily be described as "negative stereotyping" from black employees on multiple occasions and that she heard black employees use the " 'n' word" during her tenure at LCA. However, if there really were a zero-tolerance policy, the jury might well have thought it suspicious that none of those incidents involving black employees led her to follow the mandatory reporting requirement of defendant's policy, and none resulted in any escalation of punishment as occurred with plaintiff's violation.

The inference that black employees were excepted from enforcement of defendant's harassment policies

[40] Quotation marks omitted.

could reasonably have been bolstered by plaintiff's testimony. Plaintiff testified that he heard one employee make a racially charged joke about a children's cartoon character[41] and another employee call a student to her side by saying " 'hey, come here light skinned.' " None of these instances of harassing conduct was ever met with reporting, investigation, or punishment by defendant.[42] And yet, when plaintiff engaged in conduct violative of defendant's policies, his misconduct was immediately reported and investigated, and plaintiff was ultimately terminated.[43]

Particularly significant in this case, the jury was provided with evidence from which it could reasonably conclude that defendant's own management decision-makers knew about and tolerated unequal enforcement of their policies. This trial provided the interesting situation wherein a defendant's *management* employees explained that they were aware of conduct

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[41] Plaintiff's testimony was corroborated by the testimony of that employee, Clarence Scott, a black employee, who admitted that he made this racially charged joke in front of numerous employees.

[42] It is true that plaintiff did not himself report these incidents, and defendant might, perhaps justifiably, take umbrage at plaintiff seeking to hold it accountable for episodes that it might not have known about because plaintiff himself did not report them. But the question is not whether plaintiff reported these incidents. It is whether the jury could reasonably use these incidents (along with others) to draw an inference of discrimination. The jury might have reasonably inferred here that such remarks among black employees were so widespread and so uniformly tolerated that any reporting would have been futile, or even that these comments, when made by black employees, simply were tolerated and not reported.

[43] It is important to note that these proofs challenge the credibility of defendant's nondiscriminatory defense and need not be considered elements of a "similarly situated" case, which we have held requires that "all of the relevant aspects of [the plaintiff's] employment situation were nearly identical to those of [the comparative employee's] employment situation." *Town*, 455 Mich at 699-700 (opinion by BRICKLEY, J.) (quotation marks omitted).

among black employees that violated the defendant's zero-tolerance policy. This testimony could have allowed a reasonable jury to conclude that defendant applied a different standard based on race.

The critical testimony on this issue was offered by Weaver. On direct examination, plaintiff's counsel questioned Weaver as follows:

> [*Plaintiff's Counsel*]: . . . Under oath [during your deposition], I asked you this: "Did you tell Ms. Caine-Smith that a lot of people made racial jokes?"
>
> [*Weaver*]: I did not say a lot. I said it happened, and that's what's in my deposition.
>
> [*Plaintiff's Counsel*]: You said what happens?
>
> [*Weaver*]: That there were racial comments made, yes.
>
> [*Plaintiff's Counsel*]: Okay. So you told Linda Caine-Smith that when you talked to her November 3rd; right?
>
> [*Weaver*]: Yes.
>
> [*Plaintiff's Counsel*]: Okay. This is November 3rd, a few days before [plaintiff] was fired?
>
> [*Weaver*]: Um hmm. Yes.
>
> [*Plaintiff's Counsel*]: Now isn't it a fact that, when you said that, *Caine-Smith responded by saying, "It happens among African-Americans and it's not the other way around"; right?*
>
> [*Weaver*]: *Yes*.[44]

Thus, the jury was shown an exchange between two of defendant's higher-level employees in which the dean, Weaver, reported to her supervisor, principal Caine-Smith, that conduct, which was at least in some respects similar to that for which plaintiff was being investigated, routinely occurred at the school. Caine-

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[44] Emphasis added.

Smith responded by not only acknowledging the racial inconsistency, but, the jury might have concluded, by condoning it as well.[45]

This point was further emphasized as Weaver's testimony continued:

> [*Plaintiff's Counsel*]: Okay. So there, a few days before [plaintiff] was fired, when you said to Caine-Smith racial jokes happen here, how Caine-Smith distinguished [plaintiff's] situation was that the racial jokes happened amongst African-Americans; right?
>
> [*Weaver*]: And that someone was offended, yes.
>
> * * *
>
> [*Plaintiff's Counsel*]: Okay. *So there was a distinction between Craig—there was a distinction Caine-Smith—Ms. Caine-Smith made between Craig and the other jokesters; and that distinction was racial; correct?*
>
> [*Weaver*]: No
>
> [*Plaintiff's Counsel*]: Well didn't Caine-Smith—
>
> [*Weaver*]: *Oh, you're saying because it—okay, I guess I could see where you would say that, yes.*
>
> [*Plaintiff's Counsel*]: Okay. *So you would agree that the fact that Craig is white and the fact that the other jokesters were African-American, that was a factor that Caine-Smith seemed to be considering, right?*
>
> [*Weaver*]: *That's what my statement says, yes.*
>
> [*Plaintiff's Counsel*]: And that's the truth; isn't it?
>
> [*Weaver*]: That's not—no, I believe it was more about the offensiveness.
>
> [*Plaintiff's Counsel*]: *But race was still a factor?*

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[45] The jury could have interpreted this testimony in any number of ways. But, keeping in mind that all evidence and inferences must be weighed in plaintiff's favor, *Wilkinson*, 463 Mich at 391, nothing precluded the jury from viewing the testimony in this manner.

[*Weaver*]: *Race is a factor when it's a racial comment*.[46]

On this testimony the jury could reasonably find that race was a "but for" cause in the decision to investigate plaintiff and escalate the punishment for his racial comments.[47] This is true despite the arguable differences between plaintiff's racial comments and those of his black colleagues. Defendant argues that no reasonable inference of discrimination can be drawn here because plaintiff's jokes were told in a classroom and, in this case, someone was offended. These are certainly distinctions which, if credited by the jury, might reasonably have allowed it to find for defendant. But we note that when Weaver brought to Caine-Smith's attention the fact that "racial jokes happen here," Caine-Smith did not respond *only* by noting that in plaintiff's case someone was offended, or *at all* by saying that plaintiff's jokes were made in the presence of children. Instead, she responded by invoking race as a distinction. Taken together with the other evidence presented, a reasonable jury could infer that defendant violated the CRA, as evidenced by Weaver's apparent concession that race was involved in the decision.

Nevertheless, defendant presented to the jury numerous nondiscriminatory reasons for its decision to terminate plaintiff's employment—evidence of plaintiff's multiple and inconsistent explanations for his in-classroom statement about his preference for white rather than brown tables, along with evidence that plaintiff had attempted to impede the investigations and had lied or been dishonest with Caine-Smith. These reasons, not race, defendant asserted, were the reasons why it decided to terminate plaintiff.

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[46] Emphasis added.

[47] *Matras*, 424 Mich at 682.

Plaintiff, however, presented sufficient evidence for a reasonable juror to reject as unbelievable these race-neutral reasons. The testimony of defendant's witnesses contained numerous inconsistencies. First, in contradiction of Weaver's testimony, Caine-Smith testified that Weaver never told her about the other racial comments made by black employees in the school. If the jury believed Weaver, it could reasonably have discredited Caine-Smith's testimony. Moreover, Unwin's admission that termination was a disciplinary option even before defendant became aware of any allegation of plaintiff's interference with the investigation could also have led the jury to conclude that plaintiff was being treated differently because of his race.

This conclusion is buttressed by plaintiff's positive teaching record at the school and the fact that defendant chose the highest form of punishment, termination, for a first offense, without even speaking with plaintiff to obtain his version of his postsuspension discussion with Bell.[48] While the employee handbook allows for termination for a first offense, Unwin testified that the decision to terminate is normally dependent "on certain factors, including, but not limited to, the seriousness of the violation and whether it is a first time violation or a recurrence." She also testified that such a termination would "follow[] a thorough investigation . . . ." Unwin also acknowledged plaintiff's "good record" concerning race relations while working for defendant and that plaintiff had never before committed misconduct. In closing arguments, plaintiff's counsel highlighted these facts, arguing that "it just wasn't

[48] Unwin testified that some offenses are "so serious that following a thorough investigation they could result in corrective action up to and including termination from employment for the first offense."

reasonable to fire a person for this offense after such a perfect record, after such a record of good faith and fairness and respect in racial matters." Given this, plaintiff's counsel further argued, defendant "fails on the reasonableness test; and, if [defendant] did not act reasonably, something else was afoot, something else was going on . . . ." While a jury may not second-guess an employer's business decisions, and was in no way required to draw the inferences suggested by plaintiff's counsel, a reasonable jury could have used these facts to support a finding of discrimination.

With respect to the claim that plaintiff interfered with defendant's investigation, Unwin admitted that plaintiff never explicitly asked Bell to lie, though she still believed he was asking Bell to lie. And the jury heard evidence that defendant did not even speak with plaintiff regarding his postsuspension discussion with Bell. Defendant only spoke with plaintiff about the initial incident, not about the subsequent allegations of interference, and terminated him after his first offense, despite his otherwise "good" record.

Of its varying rationales for terminating plaintiff, only one—the fact that plaintiff's racial banter occurred around students—was based on information that defendant received before deciding to investigate plaintiff's wrongdoing and escalate to warnings that suspension and termination could occur as a result.[49] Like each of the other nondiscriminatory reasons provided by defendant, plaintiff disputed, albeit inconsistently, the accuracy of this allegation, claiming that none of the students was within earshot when he made his statement.

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[49] In fact, plaintiff had already been suspended pending the remainder of defendant's investigation *before* he allegedly tried to interfere with the investigation by contacting Bell and Code.

When considering this evidence as a whole, and by making all reasonable inferences in favor of plaintiff, a reasonable juror could have disbelieved defendant's race-neutral reasons for plaintiff's termination and have believed instead that consideration of his race was the cause.

The jury, as the trier of fact and deliberative body charged to make credibility determinations, could have determined that the statements of Weaver and Caine-Smith established that race was a "but for" cause of their decision-making concerning plaintiff. That testimony, along with the evidence that defendant had a zero-tolerance policy, which required reporting, investigation, and punishment of all forms of negative racial stereotyping, that it failed to apply when black employees violated the policy, in addition to the speed with which defendant terminated plaintiff, was sufficient to allow a reasonable jury to conclude that race was the real reason defendant fired plaintiff.

Because when assessing a motion for JNOV we are required "to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party,"[50] we conclude that there was sufficient evidence of discriminatory intent before the jury. The jury's verdict, finding a violation of the CRA, was supported by the totality of the evidence presented.[51]

IV. MCL 380.1230b

Because we conclude that plaintiff did present sufficient evidence to support the jury's ultimate finding

[50] *Wilkinson*, 463 Mich at 391.

[51] See *Morinelli*, 242 Mich App at 260-261 ("If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand.").

of discrimination, we must next decide whether the trial court acted contrary to MCL 380.1230b by admitting evidence that defendant reported plaintiff's misconduct to his prospective employers.

Generally, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, the[] rules [of evidence], or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."[52] Evidence may also be precluded by statute.[53] MCL 380.1230b is such a statute.

MCL 380.1230b provides, in pertinent part:

> (1) Before hiring an applicant for employment, a school district, local act school district, public school academy, intermediate school district, or nonpublic school *shall request the applicant for employment to sign a statement that does both of the following*:
>
> (a) *Authorizes the applicant's current or former employer or employers to disclose to the school district . . . any unprofessional conduct by the applicant*[54] *and to make available to the school district*, local act school district, public school academy, intermediate school district, or nonpublic school *copies of all documents in the employee's personnel record maintained by the current or former employer relating to that unprofessional conduct*.
>
> (b) *Releases the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing information described in subdi-*

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[52] MRE 402; see also *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002).

[53] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

[54] The statute defines "unprofessional conduct" as "1 or more acts of misconduct; 1 or more acts of immorality, moral turpitude, or inappropriate behavior involving a minor; or commission of a crime involving a minor. A criminal conviction is not an essential element of determining whether or not a particular act constitutes unprofessional conduct." MCL 380.1230b(8)(b).

vision (a), as provided in subsection (3), and waives any written notice required under section 6 of the Bullard-Plawecki employee right to know act . . . .[55]

(2) Before hiring an applicant for employment, a school district, local act school district, public school academy, intermediate school district, or nonpublic school shall request at least the applicant's current employer or, if the applicant is not currently employed, the applicant's immediately previous employer to provide the information described in subsection (1)(a), if any. The request shall include a copy of the statement signed by the applicant under subsection (1).

(3) Not later than 20 business days after receiving a request under subsection (2), an employer shall provide the information requested and make available to the requesting school district, local act school district, public school academy, intermediate school district, or nonpublic school copies of all documents in the employee's personnel record relating to the unprofessional conduct. *An employer, or an employee acting on behalf of the employer, that discloses information under this section in good faith is immune from civil liability for the disclosure. An employer, or an employee acting on behalf of the employer, is presumed to be acting in good faith at the time of a disclosure under this section* unless a preponderance of the evidence establishes 1 or more of the following:

(a) That the employer, or employee, knew the information disclosed was false or misleading.

(b) That the employer, or employee, disclosed the information with a reckless disregard for the truth.

(c) That the disclosure was specifically prohibited by a state or federal statute.[56]

Review of the plain language of this statute shows that it does three important things pertinent to this

[55] Plaintiff executed the statutory release before defendant provided any information to plaintiff's prospective employers.

[56] Emphasis added.

appeal: (1) it *requires* the applicant's current or former employer or employers to disclose to another school district any unprofessional conduct by the applicant;[57] (2) it *requires* an applicant for a teaching job to "[r]elease[] the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing [the] information";[58] and (3) it provides that an employer who discloses information in good faith "is immune from civil liability for the disclosure."[59] The statute, however, does not define the term "liability."

Plaintiff did not argue that defendant's disclosures were false or misleading, recklessly disregarded the truth, or otherwise violated state or federal statutes.[60] Plaintiff does contend that "liability" in

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[57] MCL 380.1230b(3).

[58] MCL 380.1230b(1)(b).

[59] MCL 380.1230b(3).

[60] Under MCL 380.1230b(3)(a) through (c), an employer that discloses the information in good faith has unqualified immunity from civil liability for the disclosure. The employer is presumed to be acting in good faith unless the evidence establishes one of the following:

> (a) That the employer, or employee, knew the information disclosed was false or misleading.
>
> (b) That the employer, or employee, disclosed the information with a reckless disregard for the truth.
>
> (c) That the disclosure was specifically prohibited by a state or federal statute.

An employee can challenge the employer's disclosures by presenting evidence to satisfy MCL 380.1230b(3)(a), (b), or (c), which then, and only then, operates to remove the good-faith presumption that entitles the employer to immunity. Because plaintiff has not pursued a challenge to defendant's immunity under MCL 380.1230b(3)(a), (b), or (c), defendant is entitled to unqualified immunity because it is presumed to have acted in good faith. We further note that this provision demonstrates that the Legislature did not foreclose plaintiffs from introducing evidence of an

MCL 380.1230b(3) refers to the *claim* for which a plaintiff is seeking recovery. In other words, plaintiff argues he is not precluded from presenting evidence of the mandatory disclosure because he did not sue for the disclosure itself—he sued for a violation of the CRA and presented evidence of the adverse impact of the disclosure to establish future damages. Plaintiff's belief is that only a direct action for the disclosure, e.g., a defamation claim, is precluded by this statute, but the admission of evidence of the disclosures in a case such as this is permissible.[61] On the other hand, defendant argues that plaintiff's position would eviscerate the protection provided by the statute and is clearly in contravention of the Legislature's expressed intent, as evidenced by the broad language of immunity it provided.

Dictionary definitions of the term "liability" support defendant's conclusion.[62] *Black's Law Dictionary* (10th

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employer's disclosures in certain circumstances, but plaintiffs are permitted to do so only after establishing that the disclosures were made in bad faith.

[61] The dissent makes a related, ostensibly compelling, argument: liability and damages are separate concepts as exemplified by the fact that we routinely bifurcate trial into liability and damage segments. There is just one problem with this argument. While we can conceptually analyze damages issues independently of liability questions, there can be no damages without liability. Period. A legislative decision completely to preclude liability necessarily precludes damages on that same basis. The dissent's position is anchored in the argument that the "civil immunity" granted by the statute depends on the *source* of the liability. We see no textual support for the dissent's view that immunity under the statute depends on the claim underlying the liability.

[62] "An undefined statutory term must be accorded its plain and ordinary meaning. A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning. A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008) (citations omitted). If the definitions are the same

ed) defines "liability" as "1. The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment . . . . 2. A financial or pecuniary obligation in a specified amount . . . ."[63] More relevant, it further defines "civil liability" as "1. Liability imposed under the civil, as opposed to the criminal, law. 2. The quality, state, or condition of being *legally obligated for civil damages*."[64] Applying these definitions of "liability" and "civil liability" to the statutory language, it is clear that the statute is sufficient in scope to preclude admission of the disclosure evidence.[65] The admission of evidence and argument regarding the mandatory disclosures for the purpose of assessing damages allowed the jury to impose against defendant legal obligations arising from the disclosure. The trial court was required to enforce the broad grant of immunity against civil liability for these disclosures that the Legislature provided to defendant, and the trial court's decision to admit this evidence violated MCL 380.1230b.

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in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts. *Id*.

[63] Emphasis omitted.

[64] *Black's Law Dictionary* (10th ed), p 1054 (emphasis altered). Lay dictionaries are similarly uniform with their definitions of "liability" and consistent with the legal definition. See, e.g., *The American Heritage Dictionary* (2d College ed) (defining "liability" as "[t]he state of being liable. . . . Something for which one is liable; an obligation or debt"); *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "liability" as "the quality or state of being liable" and as "something for which one is liable; [especially] : pecuniary obligation"). These lay dictionaries do not define "civil liability."

[65] See also *Mayfield v First Nat'l Bank of Chattanooga*, 137 F2d 1013, 1019 (CA 6, 1943) ("Liability is a broad legal term which is usually held to include every kind of legal obligation, responsibility or duty, certainly all that are measured by money obligation.").

Additionally, this Court has previously interpreted the term "liability" and other liability-limiting statutes in a manner generally consistent with defendant's position. In *Hannay v Transp Dep't*, this Court held that the phrase "liable for bodily injury" contained in the vehicle exception to governmental immunity[66] means being "*legally responsible for damages flowing from* a physical or corporeal injury to the body."[67] This Court thus interpreted the statutory phrase to permit recovery of economic and noneconomic damages arising from "bodily injury."[68] In MCL 380.1230b, the Legislature included no such limiting language (e.g., "bodily injury"), requiring simply that the job applicant release former employers from "*any* liability"[69] and granting immunity from "civil liability" to the former employer.[70] Thus, in accordance with the definition of

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[66] MCL 691.1405 ("Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is an owner . . . .").

[67] *Hannay v Transp Dep't*, 497 Mich 45, 51; 860 NW2d 67 (2014) (emphasis added).

[68] See *id*.

[69] MCL 380.1230b(1)(b).

[70] MCL 380.1230b(3).

Contrary to the dissent, we do not believe that *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005), requires the opposite conclusion. In that case, the Court merely held that a plaintiff is required to prove an *actual injury* to person or property in order to prevail on a negligence claim, despite the fact that the elements of a negligence action are routinely noted as "(1) duty, (2) breach, (3) causation, and (4) damages." *Id*. at 74. In other words, the damages sought in a negligence action must necessarily flow from an actual injury. But this distinction between "injury" and "damages" has no bearing on whether one can have damages without liability. As discussed, the plain language of MCL 380.1230b(3), unlike the elements of a negligence claim, contains no injury requirement. Therefore, our holding that the Legislature's provision of "immun[ity] from civil liability for the disclosure,"

"liable" used in *Hannay*, defendant is not "legally responsible for damages flowing from"[71] the mandatory disclosure.

Another decision of this Court, *In re Bradley Estate*,[72] is also helpful in deciding the instant case. In *Bradley Estate*, the petitioner became concerned about her brother's mental health and successfully petitioned the probate court for his hospitalization, averring that her brother was a danger to himself and his family.[73] After the probate court granted the petitions, which stated that a " 'peace officer shall take [the brother] into protective custody and transport him . . . to [a community mental health contract facility],' " the petitioner immediately submitted the order to the respondent sheriff's department.[74] The respondent sheriff's department failed to execute the court order, and nine days after the probate court order was entered, the brother committed suicide.[75]

The petitioner, acting as personal representative for her brother's estate, filed a lawsuit in circuit court against the sheriff's department for wrongful death, alleging gross negligence. The petitioner's claim was dismissed on governmental immunity grounds.[76] The petitioner did not appeal this dismissal, instead filing a petition for civil contempt in the original probate court, arguing that the sheriff's office violated the court's

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MCL 380.1230b(3), extends to preclude damages based on the disclosure, is simply unaffected by *Henry*'s discussion of injury in the negligence context.

[71] *Hannay*, 497 Mich at 51, 60-62.

[72] *In re Bradley Estate*, 494 Mich 367, 372; 835 NW2d 545 (2013).

[73] *Id*.

[74] *Id*. at 372-373.

[75] *Id*. at 373.

[76] *Id*. at 373-374.

order and that the sheriff's misconduct constituted contempt for which she was entitled to indemnification damages.[77] The sheriff's department again argued that governmental immunity barred the suit, but the probate court denied the motion for summary disposition, holding that " '[g]overnmental immunity does not insulate a contemnor from the contemnor's refusal or negligence to obey a court order.' "[78] The sheriff's department appealed in the circuit court, which reversed and remanded to the probate court for entry of an order granting summary disposition in favor of the sheriff's department because the circuit court concluded that the petitioner's claim was based in tort and barred by governmental immunity.[79] The Court of Appeals reversed the circuit court and held that the governmental tort liability act (GTLA) does not immunize governmental agencies from " 'tort-like' " damages in a contempt suit, even though the underlying facts " 'could have also established a tort cause of action . . . .' "[80]

On appeal, this Court reversed the Court of Appeals. We held that the language in MCL 691.1407(1), stating that governmental agencies are immune from "tort *liability*,"[81] meant that governmental agencies were immune from "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."[82] In reaching that conclusion, this Court held that, "[a]s commonly understood, the word 'liability,' refers to

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[77] *Id*. at 374.

[78] *Id*. at 374-375 (alteration in original).

[79] *Id*. at 375.

[80] *Id*. at 375-376.

[81] MCL 691.1407(1) (emphasis added).

[82] *Bradley Estate*, 494 Mich at 385.

liableness, i.e., 'the state or quality of being liable.' To be 'liable' means to be 'legally responsible[.]' Construing the term liability along with the term 'tort,' it becomes apparent that the Legislature intended 'tort liability' to encompass legal responsibility arising from a tort."[83]

Bradley Estate supports our construction of MCL 380.1230b and our conclusion that the disclosure evidence should not have been admitted. Though plaintiff's lawsuit clearly raises a claim under only the CRA, the admission of evidence and argument regarding the mandatory disclosures for the purpose of assessing damages allowed the jury to impose on defendant "legal responsibility arising from" the disclosure.[84] That is what the language of MCL 380.1230b(3) expressly precludes. As this Court noted in *Bradley Estate*, the label of the action does not control.[85] The statute here clearly provides that no liability—meaning "all legal responsibility arising from a . . . civil wrong"[86]—may come from the disclosures. The main difference between *Bradley Estate* and the instant case is that the Legislature's intended scope of immunity is even broader under MCL 380.1230b. The Legislature did not limit the *type* of civil liability from

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[83] *Id*. (citations omitted; second alteration in original).

[84] *Id*.

[85] *Id*. at 386-387 ("Petitioner and the Court of Appeals interpret this passage from [*Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984),] to mean that the label of the action controls in determining whether an action imposes tort liability and that, if the claim is not a traditional tort, then the GTLA is inapplicable and 'tort-like' damages are recoverable. *Ross*, however, made no such pronouncement and did not consider the meaning of 'tort liability,' which is the question that is now before this Court. Instead, consistent with our holding in this case, *Ross* merely recognized that the GTLA does not bar a properly pleaded contract claim.").

[86] *Bradley Estate*, 494 Mich at 385.

which school employers are immune for their mandatory disclosures. Instead, it provided blanket protection from all civil liability.[87] Given the plain language of the statute and our prior caselaw, we conclude that the trial court clearly erred by admitting this evidence. Its use at trial violated the statutory immunity for disclosing schools by allowing the jury to base damages on the disclosures.

We are left with one view of the statute—plaintiff was not allowed to present evidence concerning the effect of the disclosures to the jury, because, contrary to the Legislature's prohibition, that admission permitted the jury to attribute liability to defendant flowing from the disclosure.[88] The fact that the liability here is expressed in terms of damages plaintiff suffered as a result of the disclosures does not negate the fact that defendant is being held civilly liable for the statu-

[87] MCL 380.1230b(3).

[88] The breadth of the immunity afforded by this statute is underscored by the fact that the Legislature provided both complete civil immunity for disclosures and required that all new employees sign a statement that releases the school district from "*any* liability for providing information" concerning the employee's unprofessional conduct to other school districts. MCL 380.1230b. As noted, plaintiff signed this statutory release before defendant provided the disclosures to prospective employers. This belt and suspenders approach to protecting the school districts of this state is a clear indication of the Legislature's intent to preclude the type of liability imposed on defendant in this case. Defendant fulfilled its statutorily required duties under the statute and cannot be held liable therefor. Furthermore, even if we were to accept plaintiff's interpretation of the statute, at least one of the release forms plaintiff signed pursuant to MCL 380.1230b(1)(b) provided that plaintiff would "release and hold harmless" defendant for any civil or criminal liability for providing information to prospective employers. Arguably, this release form would preclude plaintiff from receiving any remuneration from defendant for the disclosures. See *Black's Law Dictionary* (10th ed) (defining "hold harmless" as "[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction").

torily mandated disclosures. The trial court erred by allowing plaintiff to present this evidence to the jury in light of the language of MCL 380.1230b(3). This error tainted the jury's entire future damages award.[89] We therefore vacate the jury's award of future damages.

V. CONCLUSION

While the Court of Appeals erred by holding that plaintiff had presented sufficient direct evidence of discrimination to sustain the jury verdict, the Court of Appeals correctly held that plaintiff presented sufficient circumstantial evidence of discrimination to sustain the jury's verdict. The trial court erred, however, by admitting evidence of defendant's mandatory disclosures of plaintiff's unprofessional conduct because MCL 380.1230b provides complete immunity for those disclosures, and the Court of Appeals erred by upholding the admission of that evidence. For these reasons, we reverse in part the judgment of the Court of Appeals, vacate the jury award for future damages, and remand this case to the trial court for further proceedings consistent with this opinion.

MARKMAN, ZAHRA, MCCORMACK (as to Parts I, II, and III), VIVIANO, BERNSTEIN (as to Parts I, II, and III), and LARSEN, JJ., concurred with YOUNG, C.J.

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[89] Defendant argued in its motion for JNOV that "the jury's award of *future* economic losses" was excessive and based on the erroneous admission of defendant's statutorily required disclosures. (Emphasis added.) As previously noted, the jury provided an itemized verdict with $485,000 in future damages. Because the trial court permitted the jury to base these future damages on the mandatory disclosures, contrary to MCL 380.1230b(3) ("An employer . . . that discloses information under this section in good faith is immune from civil liability for the disclosure."), this award cannot stand as a matter of law.

MCCORMACK, J. (*concurring in part and dissenting in part*). I agree with the majority that the plaintiff presented sufficient evidence of discrimination such that the trial court did not err by denying the defendant's motion for judgment notwithstanding the verdict. But I respectfully dissent from the majority's decision to vacate the jury award for future damages. I do not agree that the defendant's disclosures of the plaintiff's unprofessional conduct subjected the defendant to any "civil liability for the disclosure," which I agree MCL 380.1230b(3) would bar. No, the defendant incurred all its civil liability in this case when it discharged the plaintiff on the basis of race in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. The jury established that fact through its verdict in the plaintiff's favor. The jury's consideration of the defendant's disclosures merely provided the basis for the jury to determine the extent of the plaintiff's *damages*, a very different question from the issue of the defendant's *liability*.

I. MCL 380.1230b

As the majority observes, MCL 380.1230b(3) immunizes an employer from "civil liability" for disclosing information in good faith to a potential school employer about an employee's unprofessional conduct. As I see it, there are two ways that an employer might theoretically demonstrate that an employee seeks to hold it civilly liable for its disclosure of the employee's unprofessional conduct to potential employers, thereby entitling it to immunity under MCL 380.1230b.

First, the employer could show that the employee is suing it for an actual injury caused by the disclosure and resultant damages—in a cause of action for defamation, for example. No one suggests that is the case

here, given that the plaintiff sued for a completely different injury—a discriminatory discharge under the CRA.

Second, the employer can show that the plaintiff's separate action, arising from a violation of the CRA in this case, is attempting to hold it civilly liable for its disclosures under MCL 380.1230b by, as the plaintiff in this case describes it, "enhanc[ing] [the] damages" through the introduction of evidence of harm caused by the disclosures. The majority accepts this second theoretical basis for granting immunity under MCL 380.1230b. The majority reasons that our recent decisions discussing "liability" as including legal responsibility for damages flowing from an injury support the conclusion that allowing the plaintiff to recover damages established by introducing the defendant's disclosures into evidence effectively subjects the defendant to more damages and, by extension, more liability. I disagree with this reasoning.

The defendant's argument is flawed because it rests on the fundamentally faulty premise that the introduction of evidence of its disclosures increased the defendant's liability because it increased the plaintiff's damages. The majority relies on dictionary definitions of the word "liability" and our decisions in *Hannay v Transp Dep't*, 497 Mich 45; 860 NW2d 67 (2014), and *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), to support its conclusion that the statute precludes the plaintiff from introducing the disclosures into evidence to prove his future damages. I respectfully disagree. Liability and damages are related, of course, but they are not the same thing. One illustration of this fact is our courts' common practice of bifurcating proceedings on these two issues, conducting a liability phase followed by a damages phase. See, e.g., *Adama v Doehler-*

Jarvis, Div of N L Indus, Inc (On Remand), 144 Mich App 764, 767; 376 NW2d 406 (1985).

Disclosing the plaintiff's unprofessional conduct did not create additional legal responsibility for which the defendant was on the hook; rather, it was the alleged illegal act of discharging the plaintiff based on his race that gave rise to all the defendant's liability, i.e., its legal responsibility arising from a wrongful action. The injury from which the liability arose was the discriminatory discharge, not the disclosures. Introducing evidence of the defendant's disclosures of the plaintiff's conduct merely assisted the jury in determining the appropriate *remedy* for the discriminatory discharge. Put differently, evidence of the disclosures helped the jury determine the appropriate amount of damages for which the defendant was legally responsible because of its discriminatory conduct. See, e.g., *Bradley Estate*, 494 Mich at 397 (holding that "tort liability" includes "all legal responsibility arising from noncontractual civil wrongs *for which a remedy may be obtained in the form of compensatory damages*") (emphasis added).

This conclusion is entirely consistent with the dictionary definitions of the word "liability" cited by the majority and with dictionary definitions of the word "damages." The defendant's liability, i.e., the defendant's "quality, state, or condition of being legally obligated" for damages was triggered by the allegedly discriminatory decision to terminate the plaintiff's employment. *Black's Law Dictionary* (10th ed). "Damages" are defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury[.]" *Black's Law Dictionary* (7th ed).

MCL 380.1230b(3) confers immunity from *liability*, in other words, the state of being legally obligated for

damages, "for the disclosure," not from paying money as compensation for a state of legal responsibility unrelated to the disclosure. Because the statutory immunity is tied to the liability and not the remedy, I agree with the plaintiff that MCL 380.1230b(3) only precludes imposing liability (and damages flowing therefrom) on a defendant when the liability arises from an injury caused by the disclosure itself.

This Court's decision in *Hannay* further supports my analysis. In *Hannay*, 497 Mich at 64, we observed that " 'damages' and 'injury' are not one and the same—damages *flow from* the injury." Because the damages flow from the injury, and the injury in this case is the discriminatory discharge, evidence of the disclosures did not impose any additional liability on the defendant.

Bradley Estate, 497 Mich 367, is largely inapposite here. That case involved a determination whether the plaintiff was seeking to impose "tort liability" on the defendant by bringing an action for civil contempt. This Court answered the question in the affirmative. But the central question in that case was whether the plaintiff's action for civil contempt constituted a "tort" suit; there was no dispute that if the answer to that question was yes, the governmental tort liability act, MCL 691.1401 *et seq*., barred *both* liability and (necessarily) damages. The defendant in this case does not assert that the plaintiff's CRA claim is barred by MCL 380.1230b(3) or that the jury's determination that the defendant was *liable* for employment discrimination was improper under the statute; the sole issue is whether the admission of the defendant's disclosures to allow the jury to determine the proper amount of damages constituted "civil liability for the disclosure" under MCL 380.1230b(3).

This Court's decision in *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005), is far more helpful than *Bradley Estate* or *Hannay*. *Henry* instructs that a plaintiff must establish an actual injury before damages can be established, that the two are distinct, and that damages flow from the injury. *Henry*, 473 Mich at 75. As explained, disclosure of a school employee's unprofessional conduct is not an injury giving rise to damages unless the plaintiff seeks to hold the defendant liable "for the disclosure" itself. MCL 380.1230b(3). This conclusion is confirmed if one considers what could have happened if the trial court had barred evidence of the defendant's disclosures. The plaintiff presumably could have introduced other evidence showing that he applied for but was unable to obtain other teaching jobs, and the jury could have returned a verdict for exactly the same amount of damages on that basis.[1] The entirety of the defendant's liability emanates from the discriminatory discharge, not the disclosures. Damages determined as a result of the disclosures did not expose the defendant to any additional legal responsibility; instead, the disclosures simply illustrated the harm for which the plaintiff sought a remedy. The defendant had already incurred legal responsibility for that harm by discriminatorily discharging the plaintiff.

The defendant's argument, while containing some surface appeal in its simplicity, amounts to this fallacy: the admission into evidence of the disclosures increased the plaintiff's damages, and liability is defined to include damages, so the disclosure exposed the

[1] In fact, the plaintiff had to introduce such evidence. See *Morris v Clawson Tank Co*, 459 Mich 256, 264; 587 NW2d 253 (1998) (stating that the victim of a discriminatory discharge must mitigate his or her damages by making reasonable efforts to find new employment).

defendant to greater liability from which it is immune. But this is contrary to *Henry*; one must demonstrate an actual injury before damages can be assessed, and the defendant's attempt to work backward from the alleged "enhanced damages" from the disclosures to a new injury in the disclosures is contrary to *Henry*. In short, one cannot use damages to establish injury.[2] Because damages all "*flow from* the injury," *Hannay*, 497 Mich at 64, and not the other direction, the defendant's underlying premise that the disclosures somehow increased the liability from the discriminatory discharge is incorrect.

Had the Legislature intended the result reached by the majority, it could have expressed that intent much more plainly by stating that an employer that discloses information in good faith under the statute is immune from any damages established by the disclosure. Alternatively, it could have simply said that evidence of an employer's good faith disclosure under the statute is not admissible in a civil proceeding to establish a plaintiff's damages. But it did not do so; instead, it said that a defendant is immune from civil liability "for the disclosure." Given the absence of compelling textual support for the defendant's argument, I conclude that the Legislature did not intend to foreclose a plaintiff, who has established liability for an illegal discharge, from introducing evidence of an employer's disclosures in order to establish future damages and prove that he or she attempted to mitigate those damages.

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[2] The majority contends that *Henry* is not helpful here because its distinction between "injury" and "damages" says nothing about liability. But an injury is precisely what gives rise to liability (and resulting damages) in the first place; one does not typically incur legal responsibility for benign conduct. Because the two are inextricably linked, the majority's observation that the statute contains no injury requirement is, in my view, beside the point.

Accordingly, because the plaintiff's injury was the discriminatory discharge rather than the defendant's disclosures, and it was the discriminatory discharge for which the defendant was held liable, the future damages award did not constitute "civil liability *for the disclosure*." MCL 380.1230b(3) (emphasis added). Quite simply, the disclosures merely allowed the plaintiff to demonstrate to the jury the full scope of his damages resulting from the defendant's discriminatory discharge decision. I would therefore sustain the jury's award of future damages; I respectfully dissent from the majority's decision to the contrary.

II. CONCLUSION

I concur with the majority's decision to uphold the jury's verdict finding that the defendant unlawfully discriminated against the plaintiff on the basis of race. But I dissent from the majority's conclusion that MCL 380.1230b(3) barred admission into evidence of the defendant's disclosures of the plaintiff's unprofessional conduct. I would therefore uphold the damages award and affirm the judgment below in its entirety.

BERNSTEIN, J., concurred with MCCORMACK, J.

YONO v DEPARTMENT OF TRANSPORTATION

Docket No. 150364. Argued December 9, 2015 (Calendar No. 3). Decided July 27, 2016.

Helen Yono brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries sustained when she stepped into a depression in a parallel-parking space and fell. Her accident occurred in the village of Suttons Bay, where she had parked in a space specifically designated for parallel parking along the northbound side of M-22, a highway under the jurisdiction of the department. Yono alleged that the department had breached its duty under MCL 691.1402(1) to maintain the improved portion of M-22 in a condition reasonably safe and convenient for public travel and was liable under the highway exception to governmental immunity. The department moved for summary disposition, acknowledging its duty to maintain the improved portion of M-22 designed for vehicular travel but arguing that it was entitled to governmental immunity because the parking lane had not been designed for vehicular travel. The court, Clinton Canady, III, J., denied the motion. The Court of Appeals, BECKERING and M. J. KELLY, JJ. (TALBOT, P.J., dissenting), affirmed, concluding that the parallel-parking lanes on the portion of M-22 at issue were designed for vehicular travel. 299 Mich App 102 (2012). The Supreme Court ordered and heard oral argument on the department's application for leave to appeal, 495 Mich 859 (2013), and subsequently remanded the case to the Court of Appeals to consider what standard a court should apply in determining as a matter of law whether a portion of highway was designed for vehicular travel within the meaning of MCL 691.1402(1) and whether Yono had pleaded sufficient facts to create a genuine issue of material fact under that standard, 495 Mich 982 (2014). On remand, the Court of Appeals, BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ., again affirmed the Court of Claims and concluded that Yono had pleaded in avoidance of governmental immunity. The panel determined that the department had a duty to maintain in reasonable repair any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles, even if the lanes were designed as specialized, dual-purpose, or limited-access

travel lanes. The panel rejected the department's contention that paint markings used on a highway permit an inference concerning a highway's actual design because a governmental agency's decision to paint markings on a highway does not alter the fact that the highway was actually designed for vehicular travel over its full width. Because vehicles must travel into and out of parallel parking lanes in order for those lanes to serve their purpose and the designers of M-22 must have designed the parallel-parking lanes to support limited, albeit regular, vehicular travel beyond that which accompanies the use of the lanes for parking, the Court of Appeals concluded that the portion of M-22 at issue in this case fell within the department's duty under the highway exception. 306 Mich App 671 (2014). The Supreme Court granted the department's application for leave to appeal. 497 Mich 1040 (2015).

In an opinion by Justice LARSEN, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

Governmental immunity applies to a parallel-parking lane that is designated exclusively as such by painted lines on the highway because that lane is not designed for vehicular travel within the meaning of the highway exception to governmental immunity.

1. Under the governmental tort liability act, MCL 691.1401 *et seq*., the immunity conferred on governmental agencies is broad, and the statutory exceptions to that immunity must be narrowly construed. MCL 691.1407(1) provides that except as otherwise provided in the act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Under the highway exception, MCL 691.1402(1), each governmental agency having jurisdiction over a highway must maintain that highway in reasonable repair so that it is reasonably safe and convenient for public travel. An injured person, including a pedestrian, may recover damages from the governmental agency arising out of the agency's failure to do so. The duty, however, extends only to the improved portion of the highway designed for vehicular travel, that is, only the travel lanes of the highway. The question in this case was whether a parking lane is a travel lane—and therefore designed for vehicular travel—within the meaning of MCL 691.1402(1).

2. *Grimes v Dep't of Transp*, 475 Mich 72 (2006), held that the improved shoulder of a highway was not designed for vehicular travel because the word "travel" does not encompass the incremental movement that accompanies a vehicle's movement from the travel lanes onto the shoulder. The fact that a shoulder could

support even momentary vehicular travel (such as when a motorist momentarily swerves onto it) was not enough to transform the shoulder into a lane designed for vehicular travel. A shoulder is designed as a temporary breakdown or emergency area and is not intended or designed to be part of a traveler's journey from one location to another. The instant case required a determination of whether a lane of designated, curbside parallel-parking spaces was designed for vehicular travel, so *Grimes* might be read as not directly controlling. A parallel-parking lane specifically invites drivers to end their journeys there and, sometime later, begin new journeys, in a way that a shoulder does not. Under *Grimes*, however, it was necessary to avoid confusing the potential uses that a highway could support with what its design was intended to accomplish. Simply because an area of a highway can support vehicular travel in ways that are not part of its design does not bring it within the highway exception. The Court of Appeals attempted to distinguish use from design, but erred by focusing too narrowly on the highway's initial design, rather than the highway's design at the time of Yono's injury. The department's ongoing duty under MCL 691.1402(1) ensures that a highway's design is neither static nor dependent exclusively on whether a roadbed structure can support vehicular travel. Contrary to the Court of Appeals' conclusion, paint markings and other traffic control devices can delineate how a highway is designed and redesigned over its useful life.

3. The department was entitled to governmental immunity. At the time of Yono's injury, the area at issue was specifically marked as a parallel-parking lane. The department, under its statutory authority to draft the Manual on Uniform Traffic Control Devices, specifically differentiated lanes designed as parallel-parking lanes from lanes designed for travel. Although some lanes on a highway might be designed for dual purposes, the only traffic-control devices present in the lane at issue in this case indicated that it was designed to be used as a parallel-parking lane. The Court of Appeals erred by concluding that the momentary ingress and egress necessarily accompanying parallel parking is considered travel even though the same basic action was not considered travel in *Grimes*. That a person will park at the end of travel does not turn parking itself into travel.

Reversed and remanded to the Court of Claims.

Justice MCCORMACK, joined by Justices VIVIANO and BERNSTEIN, dissenting, agreed with the majority that the paint markings on the roadbed showed that the portion of the highway at issue was designed for at least parallel parking, but disagreed that a portion

of a highway designed for parallel parking is not designed for vehicular travel. A portion of a highway is designed for vehicular travel if it is designed, or intended for, a vehicle's planned and purposeful progression from origin to destination, that is, to provide a route for a vehicle's passage from one point to another. A highway may be designed to provide vehicles with any number of such routes, and the improved portions that fall within those intended routes are designed for vehicular travel and subject to the highway exception's duty of repair and maintenance. A portion of the highway designated as a location for parking a vehicle is designed to provide the beginning and ending segments of the highway's intended routes. A vehicle's passage through those segments constitutes a part of its travel as much as that vehicle's passage through various other segments of an intended route, such as those designated for thoroughfare, merging, turning, and so forth. The lines delineating the parking spots, like those marking other segments, specifically invite a vehicle to drive over that portion of the highway and offer guidance about how to do so. The majority posited that under *Grimes*, the highway exception only reaches travel lanes, which it viewed as distinct from parking lanes. While *Grimes* used the phrase "travel lane" in articulating its holding, the highway exception does not, nor does it otherwise address or differentiate between types of lanes. Furthermore, a parking lane is simply one type of travel lane for purposes of the highway exception given that it is designed to be used by a vehicle to complete and begin its passage along a route from one point to another. The majority also relied on *Grimes* to conclude that a vehicle's entry into and exit from a parking lane is indistinguishable from its use of a shoulder. While *Grimes* rejected the notion that travel should be understood as including every incremental or momentary movement a vehicle may make over an improved portion of a highway, it did not hold that travel necessarily excludes every vehicular movement that could be characterized as momentary, incremental, or short. *Grimes* did not offer an affirmative definition of "travel." Rather, it clarified that travel could not be construed so broadly as to categorically include every movement a vehicle does or could make on an improved portion of the highway. Neither *Grimes* nor any other caselaw indicated that the phrase "designed for vehicular travel" should be read as excluding any portion of a highway designed to be used as part of a vehicle's intended route between two points. The majority's conclusion otherwise did not comport with this precedent, the plain language of the highway exception, or the overarching goal of interpreting the governmental tort liability act to create a cohesive, uniform, and workable set of rules that will readily define the injured

party's rights and the governmental agency's liability. Accordingly, Justice MCCORMACK would have affirmed the denial of the department's motion for summary disposition.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — PARKING LANES — TRAFFIC-CONTROL DEVICES — PAINT MARKINGS.

The governmental tort liability act, MCL 691.1401 *et seq*., confers broad immunity on governmental agencies but also establishes six statutory exceptions to that immunity, which must be narrowly construed; the highway exception to governmental immunity, MCL 691.1402(1), requires each governmental agency having jurisdiction over a highway to maintain that highway in reasonable repair so that it is reasonably safe and convenient for public travel, and an injured person may recover damages from the governmental agency arising out of the agency's failure to do so; the duty, however, extends only to the improved portion of the highway designed for vehicular travel, that is, only the travel lanes of the highway; governmental immunity applies to a parallel-parking lane that is designated exclusively as such by painted lines on the highway because that lane is not designed for vehicular travel.

Smith & Johnson, Attorneys, PC (by *L. Page Graves*), for Helen Yono.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Kathleen A. Gleeson* and *Michael J. Dittenber*, Assistant Attorneys General, for the Department of Transportation.

Amici Curiae:

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *John J. Bursch*) for the Michigan County Road Commission Self-Insurance Pool and the County Road Association of Michigan.

Cummings, McClorey, Davis & Acho, PLC (by *Karen M. Daley*), for the Michigan Municipal Risk Management Authority.

Briggs Colegrove PC (by *Sarah W. Colegrove*) for the League of Michigan Bicyclists.

Speaker Law Firm, PLLC (by *Steven A. Hicks*), for the Michigan Association for Justice.

Carson J. Tucker for the Michigan Municipal League and the Michigan Townships Association.

LARSEN, J. This is a line-drawing case, both literally and figuratively. We are asked to decide whether a parallel-parking lane, designated exclusively as such by painted lines on the highway, is "designed for vehicular travel" within the meaning of the highway exception[1] to the governmental tort liability act (GTLA).[2] Guided by our precedent and by the admonition that we are to narrowly construe exceptions to governmental immunity,[3] we conclude that it is not. Accordingly, we reverse the judgment of the Court of Appeals, which held otherwise, and remand this case to the Court of Claims for entry of summary disposition on behalf of defendant.

I. FACTS AND PROCEDURAL HISTORY

In 2011, plaintiff, Helen Yono, visited the village of Suttons Bay and parked in a space specifically designated for parallel parking along the northbound side of M-22, a highway under the jurisdiction of defendant, the Michigan Department of Transportation (the Department). When returning to her car, she stepped into a depression in the area designated as a parallel-parking space, fell, and suffered injuries. She filed suit in the Court of Claims, alleging that the Department

[1] MCL 691.1402(1).

[2] MCL 691.1401 *et seq*.

[3] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

had breached its duty to maintain the improved portion of M-22 in a condition "reasonably safe and convenient for public travel."[4]

The Department moved for summary disposition under MCR 2.116(C)(7), claiming that it was entitled to governmental immunity. The Department acknowledged its duty, set forth in MCL 691.1402(1), to maintain the "improved portion of" M-22 that is "designed for vehicular travel," but argued that Yono's injury had not occurred on that portion of the highway because the parking lane was not designed for vehicular travel. Plaintiff countered that the entire roadbed, from one curb to the other, was designed for vehicular travel; as a result, she claimed that she had pleaded in avoidance of governmental immunity. For the court's review of defendant's motion, each party submitted an affidavit from an expert who was a highway engineer.[5]

The Court of Claims denied the Department's motion for summary disposition. The court reasoned that plaintiff had alleged an injury that occurred "in the portion of the road . . . designed for vehicular travel because [a] vehicle would have to travel to get to the parking spot . . . ."

A divided Court of Appeals affirmed.[6] The majority observed that "the highway—including that portion

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[4] MCL 691.1402(1).

[5] Defendant's expert, one of its development engineers, averred that the parallel-parking lane where plaintiff's injury occurred "is not considered part of the traveled way" and instead is separated from the travel lanes by a buffer zone. Plaintiff's expert averred that the entire paved surface consists of travel lanes, that the parallel-parking lane is dual purpose for travel and parking, and that "the only difference between the differently labeled travel lanes is the type of paint marks or striping and the measured widths of the travel lanes."

[6] *Yono v Dep't of Transp*, 299 Mich App 102; 829 NW2d 249 (2012) (*Yono I*).

designated for parallel parking—is a contiguous whole; the portion where parallel parking is permitted is not physically separated from the center of the highway by a median, driveway, or other barrier."[7] The majority agreed with the Court of Claims that "the lanes designated for parking were designed to permit vehicles to merge both from the center lanes to the parking lanes and from the parking lanes to the center lanes."[8] Moreover, the majority surmised that "the parallel parking lanes were designed to be used (when unoccupied) to travel around stopped or slow vehicles that are in the center lanes and for turns."[9] Indeed, the majority observed that "[a]bsent the painted markings, the area for parallel parking would be indistinguishable from the remainder of the highway."[10] For all these reasons, the majority concluded that the parallel-parking lanes were "designed for vehicular travel."

The dissent would have held that any vehicular travel in the parallel-parking lane "is merely 'momentary' and under limited circumstances" and that this momentary use does not "transform the purpose of its design" into vehicular travel.[11] The dissent disputed the majority's contention "that the parallel parking lane at issue was designed to be used, when unoccupied, to travel around stopped or slow vehicles in the travel lane or as a thoroughfare because those contentions are not supported by the record" and

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[7] *Id*. at 111.

[8] *Id*.

[9] *Id*. To support this proposition, the majority claimed that the Michigan Vehicle Code allows drivers "to use that type of area as a travel lane when the highway has 'unobstructed pavement not occupied by parked vehicles of sufficient width for 2 or more lines of moving vehicles in each direction[.]' " *Id*. at 111-112, quoting MCL 257.637(1)(b).

[10] *Id*. at 111.

[11] *Id*. at 116 (TALBOT, P.J., dissenting).

"MCL 257.637 . . . states in pertinent part that '[t]he driver of a vehicle shall not overtake and pass another vehicle upon the right by driving off the . . . main-traveled portion of the roadway.' "[12] And even if drivers did so use the parking lane, that would "not establish that the lane was designed for such."[13]

This Court ordered oral argument on the Department's application for leave to appeal.[14] Following argument, we remanded the case to the Court of Appeals to consider "what standard a court should apply in determining as a matter of law whether a portion of highway was 'designed for vehicular travel,' as used in MCL 691.1402(1)," and "whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under this standard."[15]

On remand, the Court of Appeals again affirmed the Court of Claims and concluded that plaintiff had pleaded in avoidance of governmental immunity.[16] The panel determined that defendant's duty is "to maintain in reasonable repair any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles . . . , even if the lanes were designed as 'specialized, dual-purpose, or limited-access travel lanes.' "[17] The panel discounted the relevance of the defense expert's affidavit because the expert "never averred that he participated in or otherwise had knowledge of the actual design of the particu-

[12] *Id*. at 117 (alteration in original).

[13] *Id*.

[14] *Yono v Dep't of Transp*, 495 Mich 859 (2013).

[15] *Yono v Dep't of Transp*, 495 Mich 982, 982-983 (2014).

[16] *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671, 675, 685-686; 858 NW2d 128 (2014) (*Yono II*).

[17] *Id*. at 692, quoting *Yono I*, 299 Mich App at 110.

lar section of M-22 at issue in this case . . . ."[18] The panel "reject[ed] the Department's repeated contention that the paint markings used on a highway permit an inference concerning a highway's actual design" because a "governmental entity's decision to paint markings on the highway does not alter the fact that the highway was actually designed for vehicular travel over its full width."[19] Because "vehicles must travel into and out of parallel parking lanes in order for those lanes to serve their purpose," and because "the designers of M-22, at minimum, must have designed the parallel parking lanes at issue to support limited, albeit regular, vehicular travel beyond that which accompanies the use of the lanes for parking," the panel concluded that the portion of M-22 at issue in this case fell within the duty outlined in the highway exception.[20]

This Court granted the Department's application for leave to appeal.[21]

II. STANDARD OF REVIEW

We review de novo the question whether the Department is entitled to summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity.[22] We similarly review de novo the underlying questions of statutory interpretation.[23]

III. ANALYSIS

In 1964, the Legislature enacted GTLA "to make uniform the liability of municipal corporations, politi-

[18] *Yono II*, 306 Mich App at 693-694.

[19] *Id*. at 695-696.

[20] *Id*. at 695.

[21] *Yono v Dep't of Transp*, 497 Mich 1040 (2015).

[22] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[23] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

cal subdivisions, and the state, its agencies and departments, when engaged in a governmental function . . . ."[24] Under MCL 691.1407(1), "[e]xcept as otherwise provided in [GTLA], a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[25] This immunity "is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function."[26] The Legislature has provided six exceptions to this broad grant of immunity, which courts must "narrowly construe[]."[27] One of these, the highway exception, exposes the Department to tort liability for failing to maintain in reasonable repair the highways within its jurisdiction.[28] The Leg-

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[24] 1964 PA 170, title. Approximately three years before GTLA's enactment, this Court had abolished common-law governmental immunity for municipalities. *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). As amended by 2002 PA 400, GTLA's title now provides that it is an act "to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof . . . when engaged in the exercise or discharge of a governmental function . . . ."

[25] MCL 691.1401(b), as amended by 2012 PA 50, defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." The prior version of the statute, as amended by 2001 PA 131, differed only in that this definition appeared in Subdivision (f) instead.

[26] *Nawrocki*, 463 Mich at 156, citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984).

[27] *Nawrocki*, 463 Mich at 158 (emphasis omitted).

[28] MCL 691.1402(1), as amended by 2012 PA 50, provides in full:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its

islature has specified, however, that this duty "extends only to the improved portion of the highway designed for vehicular travel . . . ."[29]

The first sentence of MCL 691.1402(1) articulates the general duty of a governmental agency: "Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel."[30] The second sentence allows an injured person to recover damages from the governmental agency arising out of its "failure . . . to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel . . . ."[31] The fourth sentence clarifies that

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> jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. Except as provided in [MCL 691.1402a], the duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

This statute has only minor differences from the prior version, as amended by 1999 PA 205, which are not relevant to our decision.

[29] *Id*.

[30] MCL 691.1401(c), as amended by 2012 PA 50, defines "highway" as "a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole." The prior version of the statute, as amended by 2001 PA 131, differed in that the definition appeared in Subdivision (e) instead and used plural forms for "bridge," "sidewalk," etc.

[31] MCL 691.1402(1).

> the duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[32]

When interpreting GTLA, courts must keep in mind that "the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed."[33]

In *Nawrocki v Macomb Co Rd Comm*, this Court held that the fourth sentence of MCL 691.1402(1) "narrows the duty of . . . the state . . . with regard to the *location* of the dangerous or defective condition," but not with regard "to the *type* of travel *or* traveler."[34] Pedestrians, such as Yono, may therefore plead in avoidance of governmental immunity as long as "the condition proximately causing injury or property damage is located in the improved portion of the highway designed for vehicular travel [and] not otherwise expressly excluded . . . ."[35] In *Grimes v Dep't of Transp*, this Court held "that only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)."[36] Consistently with our precedent, then, this case asks us to decide whether a parking lane is a "travel lane"—and therefore "designed for vehicular travel"—within the meaning of the statute.[37]

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[32] *Id*.

[33] *Nawrocki*, 463 Mich at 158 (emphasis omitted).

[34] *Id*. at 171.

[35] *Id*.

[36] *Grimes v Dep't of Transp*, 475 Mich 72, 91; 715 NW2d 275 (2006).

[37] The parties do not ask us to revisit *Grimes*, but the dissent claims that *Grimes*'s holding "must not be permitted to obscure or supplant the

In some sense, to ask this question is to answer it. In common English usage, a parking lane is closer to being a travel lane's antonym than its synonym. To park is to stop; to travel is to go. Deeper analysis confirms this initial impression.

In *Grimes*, the Court concluded that the improved shoulder of a highway was not designed for vehicular travel within the meaning of the highway exception because "travel" does not encompass the incremental movement that accompanies a vehicle's movement from the travel lanes onto the shoulder.[38] In so concluding, the Court cautioned against "conflat[ing] two disparate concepts: design and contemplated use."[39] Thus, the question in *Grimes* was not whether "road shoulders are 'designed' with the intention that they be *used* by vehicles"; the Department did not, in fact, dispute that they were.[40] The question instead was whether "shoulders are designed as *travel* lanes."[41]

To be designed as a travel lane and therefore to be designed for vehicular travel, the Court explained,

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language chosen by the Legislature to express its intent." *Post* at 659. We agree that the statutory language prevails. *Grimes*'s holding is this Court's interpretation of when the improved portion of the highway is "designed for vehicular travel" for purposes of MCL 691.1402(1), and we are not free to disregard it. Moreover, we view this language as a fitting shorthand for whether a particular portion of the highway is "designed for vehicular travel." The dissent agrees that paint markings matter in discovering a highway's design. It is common to speak of paint markings on a highway as denoting "lanes," "such as a 'thoroughfare lane,' a 'merge lane,' a 'turn lane,' and so on[.]" *Post* at 664. The only dispute in this case is whether a "parking lane" necessarily counts as a "travel lane," i.e., whether its designation for parking, without any other indicia of its being designed for travel, is sufficient to make it "designed for vehicular travel."

[38] *Grimes*, 475 Mich at 89-90.

[39] *Id*. at 90.

[40] *Id*. at 89.

[41] *Id*.

required something more than the fact that the shoulder "could support even momentary vehicular 'travel.' "[42] The mere fact that "a motorist momentarily swerv[ing] onto the shoulder" could, in a broad sense, "be said to have traveled on the shoulder" was not enough to transform the shoulder into a lane "designed for vehicular travel."[43]

This case presents a question more difficult than the one at issue in *Grimes*, but both focus on what constitutes vehicular travel.[44] The shoulder of a highway is designed as a temporary breakdown or emergency area. It is not intended or designed to be part of a traveler's journey from one location to another. This case calls on us to determine whether a lane of designated, curbside parallel-parking spaces is designed for vehicular travel within the meaning of the highway exception. A parallel-parking lane specifically invites drivers to end their journeys there and, sometime later, begin new journeys, in a way that a shoulder does not. As a result, *Grimes* might be read as not controlling the outcome of this case. Nevertheless, *Grimes* cautions against confusing the potential uses that a highway "could support"[45] with what its design was intended to accomplish. In other words, just because an area of a highway can support vehicular travel in ways that are not part of its design does not bring it within the highway exception. Plaintiff's evidence that the road-

[42] *Id*. at 90.

[43] *Id*. at 89.

[44] This more general understanding of vehicular travel stands in opposition to that of the dissenting opinion, which focuses on an individual's travel route. MCL 691.1402(1) directs the Court to look not at a person's actual journey from one point to another, but instead to the way in which the road was designed and whether that design was generally intended for vehicular travel.

[45] *Id*. at 90.

bed structure is consistent from curb to curb shows only that the entire roadbed could *support* vehicular travel, not that the entire roadbed was "*designed* for vehicular travel."

The Court of Appeals attempted to distinguish use from design, but its analysis focused too narrowly on the highway's *initial* design, rather than the highway's design at the time of the injury. The panel used a hypothetical example to illustrate the importance of a highway's initial design: "A governmental entity might have designed a particular highway to support vehicular travel for its full width, but might have later decided to limit the traffic to a narrow portion in the center of the highway for safety reasons or even to facilitate parking for businesses."[46] In this scenario, the panel determined that "the governmental entity's decision" to limit vehicular travel on the highway would "not alter the fact that the highway was actually designed for vehicular travel over its full width" when it was initially constructed.[47] The panel also emphasized its belief that "paint markings on the highway do not correspond to the actual design . . . in the absence of specific evidence connecting the design with the proposed markings . . . ."[48]

By focusing on the highway's design at the time of its initial construction, rather than its design at the time of the injury, the Court of Appeals ignored the Department's ongoing duty to ensure that the highways of this state are safe for vehicular travel.[49] That

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[46] *Yono II*, 306 Mich App at 695-696.

[47] *Id*. at 696.

[48] *Id*. By using the phrase "proposed markings," the Court of Appeals suggested that the only potentially relevant paint markings are those predating the highway's construction.

[49] MCL 691.1402(1).

ongoing duty ensures that a highway's design is neither static nor dependent exclusively on whether a roadbed structure can "support vehicular travel."[50] Contrary to the Court of Appeals' conclusion, paint markings and other traffic control devices can and do delineate how a highway is designed and redesigned over its useful life.[51]

Consider a situation familiar to all Michigan drivers: highway repairs. Suppose a state highway develops a sinkhole within a travel lane that renders the lane unsafe for travel. As the Department repairs the defect in the highway, it might place traffic-control devices—including barricades, signage, and paint markings—to authorize drivers to travel along what had initially been designed as the highway's shoulder. That shoulder—not the closed lane under repair—would then have been redesigned "for vehicular travel" within the meaning of MCL 691.1402(1), albeit temporarily. Once the repair is complete, the traffic-control devices would be removed, the paint lines would again designate the area as a shoulder, and the design of the highway would again have changed and reverted back to its initial design as a shoulder.

As a result, and contrary to the Court of Appeals' analysis, we must consider how the Department had designed the highway at the time of the alleged injury.

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[50] See *Yono II*, 306 Mich App at 695-696.

[51] The Michigan Vehicle Code provides an explicit connection between a highway's traffic-control devices and the Department's design for a highway. MCL 257.608 gives the Department, in conjunction with the State Police, the authority to "adopt a manual and specifications for a uniform system of traffic-control devices . . . for use upon highways within this state." MCL 257.611(1) gives those traffic-control devices legal effect for enforcing the Department's intended design of a highway by providing that "[t]he driver of a vehicle . . . shall not disobey the instructions of a traffic control device . . . ."

The parties do not dispute that the area at issue in this case was specifically marked as a parallel-parking lane at the time of the alleged injury. The Department, in exercising its statutory authority to draft the Manual on Uniform Traffic Control Devices,[52] has specifically differentiated lanes designed as parallel-parking lanes from lanes designed for travel.[53] Although some lanes on a highway might be designed for dual purposes, the only traffic-control devices present in the lane at issue in this case indicate that it was designed to be used as a parallel-parking lane.[54] Although plaintiff's expert opined that drivers sometimes travel along the parallel-parking lane when it is convenient to do so, the evidence presented regarding the lane's *design*—the paint delineating the individual parallel-parking spaces—showed a parallel-parking lane, not a travel lane.[55]

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[52] See MCL 257.608.

[53] The manual defines "traveled way" as "the portion of the roadway for the movement of vehicles, exclusive of the shoulders, berms, sidewalks, and parking lanes." Manual on Uniform Traffic Control Devices (2011 Michigan MUTCD), p 22.

[54] The similar circumstance of angled on-street parking helps to illustrate the single purpose delineated by the paint markings at issue in this case. Where the Department or a local road authority has provided angled on-street parking for drivers, it is evident that the highway is not designed for vehicles to use the entire width of the paved surface for travel, even when unobstructed. We do not see any substantive difference between specifically delineated angled-parking spaces and parallel-parking spaces.

[55] In *Yono I*, the Court of Appeals supported its conclusion that the entire roadbed was designed for vehicular travel by citing MCL 257.637(1)(b), which allows the driver of a vehicle to "overtake and pass upon the right" another vehicle when "unobstructed pavement not occupied by parked vehicles [is] of sufficient width for 2 or more lines of moving vehicles in each direction . . . ." *Yono I*, 299 Mich App 111-112. However, this only applies "when the vehicles are moving in substantially continuous lanes of traffic," MCL 257.637(1)(b), and MCL 257.637(2) provides that a driver may not "pass another vehicle upon

The dissent and the Court of Appeals conclude that the momentary ingress and egress necessarily accompanying parallel parking independently warrants the determination that the parking lane is designed for vehicular travel. *Grimes*, however, rejected the notion that "travel" should be "broadly construed to include traversing even the smallest distance . . . ."[56] If traversing a short distance (entering and exiting the shoulder) is not "travel" within the meaning of the statute, we do not see how the same basic action (entering and exiting a parking lane) can be considered travel and still be faithful to our precedent.[57]

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the right by driving off the pavement or main-traveled portion of [a] roadway." The Court of Appeals, therefore, erred by relying only on Subsection (1)(b): by placing paint markings differentiating the parking area from the travel lanes, the highway designers indicated that the use of that area would be limited to parallel parking and the momentary ingress and egress that accompanies it. MCL 257.611(1) provides that "[t]he driver of a vehicle . . . shall not disobey the instructions of a traffic control device . . . ." MCL 257.70 defines "traffic control devices" as "all signs, signals, markings, and devices not inconsistent with this act placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning or guiding traffic."

[56] *Grimes*, 475 Mich at 90. The dissent observes that "the lines delineating the parking spots . . . specifically invite a vehicle to drive over this portion of the highway" and contrasts this invitation to that of a shoulder, "which, as its own paint markings and other designators make clear, is not designed as part of an intended route, but instead is designed to run alongside that route and provide temporary accommodation for emergently stopped or disabled vehicles." *Post* at 661-662. We are not persuaded. The act of parking—like the act of pulling onto the shoulder of a highway—is only incidental to travel. In each circumstance, the responsible governmental agency has separated the part of the highway designed for vehicular travel from the part of the highway where vehicles cease or begin traveling. Moreover, the responsible governmental agency specifically invites motorists to engage in incidental movement when going into and out of both shoulders and parking spaces.

[57] There is no allegation in this case, nor do we think there reasonably could be, that the distance one might travel from the right lane onto the

The dissent posits that the act of parking "completes, and is thus a part of," vehicular travel.[58] On this theory, "a 'parking lane' . . . is simply a type of 'travel lane' for purposes of the highway exception . . . ."[59] That a person will park at the end of travel does not turn parking into travel. To draw from the dissent's definitions, "travel" involves " 'the coming and going of people or conveyances along a route' " or " 'movement or passage in general.' "[60] These definitions connote movement, not starting or stopping a journey, and the parking lanes at issue here do not invite movement

shoulder is somehow greater than the distance one might travel from the right lane into a parallel-parking lane such as the one at issue here. The dissent believes that this is beside the point because, as the dissent sees it, even if the physical actions are the same, "the vehicle using the shoulder is digressing from the highway's designed vehicular route, whereas the vehicle using the parking spot is proceeding along it[.]" *Post* at 664-665. We do not find this distinction persuasive: like the vehicle using the shoulder, the vehicle using the parking spot also digresses from the highway's travel lanes—the portion of the highway designed for vehicular travel. That digression is what makes the difference in this case.

The dissent distinguishes the often unplanned movement involved in a vehicle's use of a shoulder from the often planned movement involved in its use of a parking lane. But this distinction is inconsistent with its broad definition of "travel" and shows why its rationale is ultimately inconsistent with *Grimes*. The dissent claims that a parking lane is designed for travel because travel does not end until the vehicle comes to a complete stop, while criticizing this opinion for suggesting otherwise. But, to be faithful to *Grimes*, we must recognize that travel necessarily ends before a vehicle reaches a complete stop along a shoulder. That a shoulder stop is often unplanned and a parking stop is often planned does not matter. *Grimes* informs us that a highway's design for vehicular travel does not encompass the incidental movement required to bring a vehicle to a stop along a shoulder. That holds equally true for a portion of the highway designed solely for parking, as the paint markings at issue here illustrate.

[58] *Post* at 663.

[59] *Post* at 664.

[60] *Post* at 660, quoting *Random House Webster's College Dictionary* (2005).

that is more sustained than that at issue in *Grimes*. Indeed, in common parlance, we consider traveling and parking to be two different things. We travel *to* our destination, and we park once we have *arrived*.

"[O]ne basic principle . . . must guide our decision today: the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed."[61] Our caselaw teaches that "[b]ecause [MCL 691.1402(1)] is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute."[62] We cannot conclude that the statute clearly applies to the act of parking, which is only incidental to travel and does not itself constitute travel. Accordingly, defendant is entitled to governmental immunity.[63]

Our holding does not suggest that the highway exception requires that the area in question be designed *exclusively* for vehicular travel. For example, signage might indicate particular hours during which a designated parking lane is to be used as an additional travel lane. Or a street in a residential neighborhood, with no designated parking lane, might be designed for both curbside parking and vehicular travel.[64] In this

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[61] *Nawrocki*, 463 Mich at 158.

[62] *Id*. at 158-159, citing *Scheurman v Dep't of Transp*, 434 Mich 619, 629-630; 456 NW2d 66 (1990) (opinion by RILEY, C.J.).

[63] Because no fact questions remain regarding the highway's design, we do not reach the issue of how to resolve fact questions on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7).

[64] This may have been the factual situation in *Nawrocki*, and, if so, it would distinguish the facts of *Nawrocki* from those of the present case. But whether the design of the highway in *Nawrocki* can be distinguished from the highway design here is irrelevant because our opinion in *Nawrocki* did not address the only question at issue in this case:

case, however, the lane was designated by the paint markings as a parking area, with no indication that it was also designed for vehicular travel. Accordingly, plaintiff cannot fit these facts into the narrow confines of the highway exception to GTLA.[65]

For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the Court of Claims for entry of summary disposition in favor of defendant.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with LARSEN, J.

MCCORMACK, J. (*dissenting*). I respectfully dissent. I agree with the majority on a number of points: that the immunity conferred by the governmental tort liability

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whether the situs of the injury was within the improved portion of the highway "designed for vehicular travel." Instead, this Court in *Nawrocki* held only that a pedestrian could plead in avoidance of governmental immunity under the highway exception. Plaintiff, nonetheless, "remains steadfast that *Nawrocki* remains dispositive," drawing our attention to the factual similarities between that case and the present one, and even appending contemporary (though not contemporaneous) Google Maps Street View photographs of the accident site in *Nawrocki*. This effort is misplaced. As we said recently: "To argue, by working backwards from" the facts of a case to a conclusion of law not addressed by the Court "is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016).

[65] The dissent posits that, under this holding, the governmental agency will sometimes have an obligation to maintain the improved portion of the highway "as to a parking-designated portion of a highway" and sometimes not. *Post* at 669. This is because we and the dissent have different understandings of what constitutes vehicular travel, not because our decision is somehow inconsistent with our prior precedent. Our decision today is entirely consistent with *Grimes*. Whether the governmental agency has an actionable duty to maintain the improved portion of the highway in reasonable repair depends on whether that portion is designed for vehicular travel, and this will *always* depend on the nature of the location at issue.

act (GTLA), MCL 691.1401 *et seq*., is broad, and its exceptions, such as the highway exception, are narrowly drawn; that, in assessing whether the alleged defect in this case fell within the scope of that exception, it is necessary to consider the design of the highway at the time of the injury; that the highway's paint markings at that time provide relevant evidence of its design; and that neither *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), nor *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006), is dispositive of whether the improved portion of the highway at issue here was "designed for vehicular travel." MCL 691.1402(1). I cannot agree, however, that under a proper interpretation of the highway exception's plain language or a proper application of our precedent, the defendant is entitled to immunity and summary disposition in this case.

It is important, at the outset, to remember precisely what the controlling inquiry is: whether the alleged defect was located in "the improved portion of the highway designed for vehicular travel . . . ." MCL 691.1402(1). The majority, relying on *Grimes*, 475 Mich at 73-74, uses different language to frame this question, asking "whether a parking lane is a 'travel lane'—and therefore 'designed for vehicular travel'—within the meaning of the statute." *Grimes* did, of course, use the phrase "travel lane" in articulating its holding; the statute, however, does not, nor does it otherwise address or differentiate between types of "lanes." And as this Court has made clear, we must tread very carefully when using terminology foreign to the statute in analyzing its scope: our interpretation must always start with and remain governed by "a close examination of the statute's plain language" and not "merely attempt[] to add still another layer of judicial gloss to those interpretations of the statute

previously issued by this Court and the Court of Appeals." *Nawrocki*, 463 Mich at 150. I question whether the phrase "travel lane" is an apt shorthand for "improved portion of the highway designed for vehicular travel," but regardless, our interpretive obligation is to ensure it becomes nothing more than that; the phrase must not be permitted to obscure or supplant the language chosen by the Legislature to express its intent.[1]

When construing that plain language in light of the facts of this case, I fail to see why the location of the alleged defect at issue fell outside "the improved portion of the highway designed for vehicular travel." There is no dispute here that this defect was located in an "improved portion of the highway"; the only question is whether that portion of the highway was, at the time of the injury, "designed for vehicular travel." The paint markings on the roadbed designated this portion of the highway for parallel parking, and I agree with the majority that this evidences it was designed for at least that use.[2] I disagree, however, that a portion of

[1] The majority notes that "we are not free to disregard" *Grimes*'s holding, including its use of the phrase "travel lane." I, of course, agree that *Grimes* cannot be disregarded here, nor do I think it should be; I do not take issue with that case's ruling that shoulders are not designed for vehicular travel, and—as set forth *infra*—I find its reasoning fully compatible with and supportive of my conclusion that parking-designated portions of a highway are so designed. Reaching that conclusion requires no disregard of *Grimes* or its chosen terminology—just a proper understanding of its meaning and role in our interpretive exercise, as discussed above.

[2] In remanding this case for entry of an order granting the defendant's motion for summary disposition, the majority concludes that these paint markings evidence, as a matter of law, that this portion of the highway was designed exclusively for parallel parking. It remains unclear to me why these markings necessarily have that legal effect—that is, what authority makes clear that the presence of these markings designates this portion of the highway for parallel parking to the complete

the highway designed for parallel parking is not "designed for vehicular travel."

The GTLA does not define "travel." The word's lay definitions vary in breadth, but they commonly comprise and contemplate a planned and purposeful progression from an origin to a destination—or, in terms particularly relevant here, the passage along a route from one point to another. As a verb, for instance, to "travel" is, variously, to "go," "move," or "pass" "from one place or point to another"; to "take a trip"; to "proceed or advance"; "to move in a fixed course, as a piece of mechanism"; and "to journey or traverse (a specified distance)." *Random House Webster's College Dictionary* (2005). When used as a noun, as it is in the highway exception, "travel" is, for instance, "the coming and going of people or conveyances along a route," and "movement or passage in general," with "passage" being "the route or course by which a person or thing passes or travels." *Id*. "Route," in turn, is "a course, way, or road for passage or travel," and "a customary or regular line of passage or travel"; "course," similarly, is "a direction or route taken or to be taken," and "advance or progression in a particular direction." *Id*.

Accordingly, under the plain meaning of the highway exception's terms, a portion of a highway is "designed for vehicular travel" if it is designed, or intended, for a vehicle's planned and purposeful progression from origin to destination—that is, to provide a route for a vehicle's passage from one point to

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exclusion of all other vehicular uses. Ultimately, however, I see no need to reach or resolve this issue. Because, in my estimation, an improved portion of a highway designed exclusively for parking is "designed for vehicular travel," the defendant's motion fails, regardless of any factual dispute there may be over whether the portion of the highway at issue here was also designed for other vehicular uses at the time of the plaintiff's injury.

another. See *Suttles v Dep't of Transp*, 457 Mich 635, 648; 578 NW2d 295 (1998) (opinion by MALLETT, C.J.) (" '[T]he phrase "designed for vehicular travel" can only be reasonably interpreted to mean "*intended* for vehicular travel." ' "), quoting *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 137; 523 NW2d 791 (1994) (alteration in original). A highway may be designed to provide vehicles with any number of such routes; the improved portions of the highway that fall within these intended routes—and thus invite vehicles to drive over them as part of the vehicles' planned progression from one point to another—are "designed for vehicular travel" and are subject to the highway exception's duty of repair and maintenance.[3]

An improved portion of the highway designated for parallel parking falls comfortably within this reading of the statute's plain language. By designating a location for the parking of a vehicle, this portion of the highway is designed to provide the beginning and ending segments of the highway's intended route(s). A vehicle's passage through these beginning and ending segments constitutes a part of its "travel" as much as that vehicle's passage through various other segments of an intended route, such as those designated for thoroughfare, merging, turning, and so forth—none of which the defendant contends, or our caselaw indicates, would fall outside "the improved portion of the highway designed for vehicular travel." Indeed, the lines delineating the parking spots, like those marking

[3] The majority alludes to a "more general understanding of vehicular travel" that "stands in opposition to" the one I offer here. I am uncertain what that is, exactly; as the above makes clear, however, I agree that, for purposes of the highway exception, what matters is not the "actual" path a vehicle may or does end up taking over the improved portions of a highway, but the route(s) the highway was designed to provide for that vehicle in progressing from one point to another.

these other segments, specifically invite a vehicle to drive over this portion of the highway and offer guidance as to how. This stands in clear contrast to the portion of the highway designated as its shoulder, which, as its own paint markings and other designators make clear, is not designed as part of an intended route, but instead is designed to run alongside that route and provide temporary accommodation for emergently stopped or disabled vehicles.

The majority acknowledges and articulates much of this: namely, that a portion of a highway designated for parallel parking "specifically invites drivers to end their journeys there and, sometime later, begin new journeys," whereas "[t]he shoulder of a highway is designed as a temporary breakdown or emergency area" and "is not intended or designed to be part of a traveler's journey from one location to another." Nonetheless, the majority concludes that this parking-designated portion of the highway is, like a shoulder, not designed for vehicular travel because "parking . . . is only incidental to travel and does not itself constitute travel." This conclusion is seemingly premised on two core points: (1) the belief that "[i]n common English usage, a parking lane is closer to being a travel lane's antonym than its synonym" because "[t]o park is to stop" but "to travel is to go" and "[w]e travel *to* our destination" but only "park once we have *arrived*" at it; and (2) the notion that "the momentary ingress and egress necessarily accompanying parallel parking" does not constitute "travel" under *Grimes* because that case "rejected the notion that 'travel' should be 'broadly construed to include traversing even the smallest distance . . . .' " I find neither point convincing.

First, as noted, focusing on whether the term "parking lane" is closer to being the synonym or the antonym

of "travel lane" risks misplacing the relevant interpretive inquiry, given that the highway exception does not articulate or attempt to define itself on the basis of different types of "lanes"; it simply asks whether portions of the highway are improved and, if so, designed for vehicular travel. See *Nawrocki*, 463 Mich at 175 (overruling a prior decision of this Court for "fail[ing] to simply apply the plain language of the highway exception and, instead, rel[ying] on judicially invented phrases nowhere found in the statutory clause"). And perhaps more fundamentally, I do not find apt the majority's offered distinction between these types of "lanes," or more generally between travel and parking. As discussed, "travel" is not simply the act of going; it is the passage, the progression along a route, from one point to another. Accordingly, for purposes of interpreting the highway exception, a "travel lane" is an improved portion of the highway that is designed for such vehicular passage. The act of parking the vehicle completes, and is thus a part of, that passage; I fail to see why that act would not constitute travel simply because it involves bringing the vehicle to rest. Nor, for that matter, do I see why a vehicle should be deemed to have completed its travel, and arrived at its intended destination, at some point before it reaches that designated terminus of its route. Furthermore, and as the majority recognizes, a "parking lane" is designed not only as a means for a vehicle to end its route, but also as a means to begin one—that is, "to go."[4] Thus, even framing the inquiry with the

[4] The majority notes that the definitions of "travel" discussed above "connote movement, not starting or stopping a journey," but I see no such distinction in those definitions. The acts of starting and stopping a journey, of course, always involve movement. And as discussed, the definitions of "travel" contemplate passage, movement, along a route from one point to another. Nowhere do those definitions suggest that

majority's terminology, I reach the same result: a "parking lane"—like the many other "lanes" on a highway (such as a "thoroughfare lane," a "merge lane," a "turn lane," and so on), but unlike a shoulder—is simply a type of "travel lane" for purposes of the highway exception and therefore falls within that exception's scope.

This feeds into the majority's second offered reason: that, under *Grimes*, a vehicle's entry into and exit from a "parking lane" is not "travel" because that movement, like a vehicle's momentary use of a shoulder, involves "the same basic action" of "traversing a short distance." For the reasons discussed, I cannot view these movements as "the same basic action" for purposes of the highway exception. It is true that, in making a brief detour onto a shoulder, a vehicle might go through the same physical actions it would in using a parallel-parking spot, with the only difference being the paint markings over which the vehicle passes in

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travel comprises less than all of that movement along a route or excludes the segments that entail departing from a designated point of origin and reaching a designated point of destination. The majority gestures toward *Grimes* in support of that reading of "travel," but as discussed *infra*, such reliance is misplaced.

Nor do I understand the practical implications of such a construction of "travel." When is a vehicle deemed to have completed its travel—to have, as the majority put it, arrived at its destination—if not at the point where its route reaches a designated end point? What, if not those designated points, marks the start and end of the travel? Does the travel, for instance, simply end when the vehicle is in closest proximity to the location to which its driver ultimately plans to go after parking and exiting the vehicle? If the driver proceeds further—down the street, around a corner, and so on—in search of an available parking spot, is none of that part of its travel? And if it is, why, then, does the travel continue that far but then suddenly cease when the vehicle reaches some certain, but unspecified, proximity to the available spot? I see nothing in the definitions of "travel," or in *Grimes*, that would invite these questions, let alone suggest their answers.

doing so. But as the majority makes clear, the paint markings cannot be ignored in our statutory analysis; they are critical indicators of the dispositive inquiry—for what purpose was the improved portion of the highway at issue designed? Accounting for this inquiry, the analogy does not hold: the vehicle using the shoulder is digressing from the highway's designed vehicular route, whereas the vehicle using the parking spot is proceeding along it; the former is not driving on a portion of the highway designed for vehicular travel, but the latter is. These two vehicular movements are thus fundamentally distinct under the highway exception, regardless of their physical similarities.[5]

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[5] I thus agree with the majority that the "digression is what makes the difference," in that a vehicle is digressing from its intended route when it uses a shoulder, but is proceeding along that route when using a parking-designated portion of the highway. Both portions of the highway, as the majority notes, may be used by a vehicle in "com[ing] to a complete stop," but only the parking-designated portion is designed to be used by a vehicle as a part of its passage along a route from one point to another. Indeed, if a vehicle's passage between points goes as designed, the vehicle never makes use of the shoulder; that passage always will, however, and must, begin and end with use of a parking space. The critical distinction is in the design. The majority rejects this distinction—and the corresponding notion that a "parking lane" is, unlike a shoulder, just another type of "travel lane"—by repeating that parking "is only incidental to travel . . . ." But this simply offers the conclusion in support of itself. It does not explain why use of a parking-designated portion of a highway is "incidental" to, or a "digression" from, travel when it—unlike use of a shoulder—is an intended and required part of a vehicle's route from one point to another. Nor does it explain why, in light of this distinction in design, a vehicle should be considered to have been "specifically invite[d]" by the governmental agency to "cease or begin traveling" when using a shoulder in the same way it has when using a parking-designated portion of the highway. Or why "the paint markings at issue here," distinct as they may be from the solid white line designating a shoulder, should nonetheless be taken to "illustrate" this equivalence. For all the reasons discussed herein, I agree that the parking-designated portion of the highway is designed for the beginning and ending stages of travel; the shoulder, however, is

Nor do I read *Grimes* to bolster this analogy. I agree that *Grimes* rejected the notion that "travel" should be understood to comprise every "incremental" or "momentary" movement a vehicle may make over an improved portion of a highway. *Grimes*, 475 Mich at 89-90; it did not, however, hold, and cannot fairly be read to suggest, that "travel" necessarily excludes every vehicular movement that could be characterized as momentary, incremental, or short.

Grimes did not offer an affirmative definition of "travel." It acknowledged that to "travel" is commonly understood to mean "to go from one place to another" and declined to read that common understanding in its "broadest and most literal sense" such that it would necessarily "include the shortest incremental movement by a vehicle on an improved surface"—as when, for instance, "in an emergency . . . a motorist momentarily swerves onto the shoulder . . . ." *Id*. at 89 & n 51 (quotation marks and citation omitted). *Grimes* did not, however, purport to define "travel" on the basis of this single illustration, nor did it suggest that "travel" should be understood as comprising only movements of a certain length or duration. Rather, what *Grimes* made clear through this illustration was that "travel" could not be construed so broadly as to categorically include every movement a vehicle does or could make on an "improved portion of the highway," as doing so would leave no meaning to the phrase "designed for vehicular travel" and would ignore the Legislature's express focus on design rather than use:

> If "travel" is broadly construed to include traversing even the smallest distance, then it must follow that every area

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designed for no such travel. Their respective markings reflect this critical distinction, and I fail to see why our ruling here should not as well.

> surrounding the highway that has been improved for highway purposes is "designed for vehicular travel" since such improved portions could support even momentary vehicular "travel." Under plaintiffs' interpretation, then, every "improved portion of the highway" is also "designed for vehicular travel." This interpretation renders these phrases redundant and contravenes a settled rule of statutory interpretation. It also conflates two disparate concepts: design and contemplated use. That vehicular traffic might *use* an improved portion of the highway does not mean that that portion was "designed for vehicular travel." Therefore, in an effort to give meaning to every word of the highway exception and to honor the Legislature's expressed intent, we reject plaintiffs' construction of the highway exception. [*Id*. at 90.]

Thus, as *Grimes* explained, "an intentionally sloped grassy median" running between the northbound and southbound lanes of a highway cannot be considered "designed for vehicular travel" simply because it has been "shaped in that fashion for any number of highway-related purposes" and "could support even momentary vehicular 'travel.' " *Id*. at 90 & n 53. And, per *Grimes*, the same holds for the shoulder of a highway.[6]

At no point did *Grimes* suggest that this reasoning or result depended on how far a vehicle could drive on the grassy median, or shoulder, or other improved

[6] In light of this emphasis on design rather than use, I struggle with the majority's suggestion that, under a "faithful" reading of *Grimes*, it simply "does not matter" "[t]hat a shoulder stop is often unplanned and a parking stop is often planned . . . ." Ignoring that distinction, in my mind, is no more compatible with *Grimes* than ignoring the difference between a vehicle driving down the shoulder and one driving on a portion of the highway designated for thoroughfare. For both the thoroughfare- and parking-designated portions of the highway, the governmental agency has planned, and thus designed, them to be used as part of the vehicle's route; the shoulder's usage has not been so planned.

portion of the highway.[7] Nor did it suggest that two vehicular actions should be considered "the same" for purposes of the highway exception simply because they both could be characterized as "traversing a short distance." Rather, *Grimes* made clear that the phrase "designed for vehicular travel" cannot be defined to comprise every improved portion of the highway over which a vehicle could end up driving as it proceeds from one point to another, irrespective of whether the portion was designed to be used as part of the vehicle's route between those points. Nothing in *Grimes* suggests that "travel" would exclude some portions of such a designed route.[8] And indeed, no other caselaw has indicated that an improved portion of a highway is not "designed for vehicular travel" when it has been designed to be a part of a vehicle's intended route on that highway.

The majority stresses that the highway exception is to be construed narrowly. I agree. See, e.g., *Nawrocki*, 463 Mich at 149-150. It cannot, however, be construed more narrowly than the Legislature intended, as expressed through the plain language it chose. See *id*. at 150-151. For the reasons discussed, I am unable to

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[7] *Grimes*, for instance, did not suggest that the highway exception's coverage of a shoulder may depend on how far or safely the shoulder's design permitted a vehicle to drive over it; its assessment of these improved portions of a highway was categorical.

[8] This reading also comports with the majority's example of an improved portion of the highway that is normally designated as a shoulder, but has been temporarily redesignated as part of the highway's vehicular route while repairs are underway on another improved portion of the highway. The redesignation renders that portion of the highway "designed for vehicular travel"—a conclusion that depends not on what length of the shoulder has been redesignated, but instead on the fact that, through such redesignation, vehicles have been invited to drive over that portion of the highway as part of their passage from one point to another.

discern a reading of the highway exception's plain language that is narrow enough to exclude the improved portion of the highway at issue here. Nor do I see how such a reading would comport with our established, overarching interpretive goal " '[i]n resolving the questions presented by' " the GTLA: " 'to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability.' " *Id*. at 148-149, quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596; 363 NW2d 641 (1984). Rather, under the majority's interpretation of the highway exception, the governmental agency has a duty to maintain and repair some segments of a vehicle's intended route, but not others; it can mark an improved portion of the highway for parking—and thus specifically intend and invite a vehicle to begin or end its route there—but unlike the other segments of that intended route, have no obligation whatsoever to ensure that it is, in fact, "reasonably safe and convenient" for such passage (or any other "public travel," for that matter). MCL 691.1402(1). The governmental agency will not always be free from this obligation as to a parking-designated portion of a highway, and likewise, a traveler will not always be afforded its assurances of safety and fitness when parking in a given spot. Whether the obligation exists, and whether a traveler can expect a parking spot to be kept safe, will vary from spot to spot, depending on whether the spot is designated only for parking, and if so, whether that designation applies all of the time, or some of it. As to the particular parking spot here, the majority instructs that the defendant had no actionable duty; as to other types of spots, or other segments of a vehicle's intended route, it remains largely unclear to me how this ruling should be under-

stood and applied.[9] None of this—the majority's ruling, or its consequences—strikes me as consistent with or supported by our prior precedent regarding how the highway exception should be interpreted. And more fundamentally, I cannot conclude that the Legislature intended any of it when plainly mandating a duty to maintain and repair "the improved portion of the highway designed for vehicular travel." MCL 691.1402(1).

The majority says this is "a line-drawing case." The lines it purports to draw, however, do not match those I see in the statute, in our precedent, or on the road. Accordingly, I dissent and would affirm the denial of the defendant's motion for summary disposition.

VIVIANO and BERNSTEIN, JJ., concurred with MCCORMACK, J.

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[9] What of other types of paint markings that may be used to designate a portion of the highway for parking, for instance? What is the effect of other potential designators, such as parking meters on the curb? And what if the parking-designated portion is not clearly or completely delineated; how are its boundaries—and the corresponding scope of the governmental agency's obligations—determined? Somewhat similarly, if a portion is designated exclusively for parking at some times of the day but not others, does the governmental agency's immunity depend on during which of those time periods an injury was suffered? And are there now other segments of a highway's intended vehicular route that, by similar analogy to *Grimes*, can also be broken off and carved out from the governmental agency's duty to maintain and repair? How should that assessment be made, and according to what criteria? Is it any segment of the route whose intended vehicular use can be characterized as "momentary," "incremental," "short," or some other such descriptor? At what length does a segment of a route become "incremental," and how should the segment's beginning and ending points be determined?

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition February 2, 2016:

PEOPLE v FRYE, No. 149871; Court of Appeals No. 322170. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the St. Joseph Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v BOUDRIE, No. 151317; Court of Appeals No. 325681. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Iosco Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DAVID JOHNSON, No. 151535; Court of Appeals No. 318833. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse, in part, the judgment of the Court of Appeals, and we remand this case to the Tuscola Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence

absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MCDANIEL, No. 151792; Court of Appeals No. 326070. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant.

NOTTINGHAM VILLAGE CONDOMINIUM ASSOCIATION v PENSOM, No. 151874; Court of Appeals No. 319552. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that remands for an evidentiary hearing to determine reasonable attorney fees and costs due the defendants. The Court of Appeals does not provide authority for awarding attorney fees and costs to the defendants. This order is without prejudice to the defendants seeking in Wayne Circuit Court any attorney fees and costs to which they might be entitled. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v HAMAD, No. 151925; Court of Appeals No. 326038. By order of November 24, 2015, the prosecuting attorney was directed to answer the application for leave to appeal the May 15, 2015 order of the Court of Appeals, and the defendant was invited to file a supplemental brief. On order of the Court, the answer and supplemental brief having been received, the application for leave to appeal is again considered. The defendant's conditional guilty plea was agreed to by the prosecution and accepted by the trial court on the record. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for further proceedings consistent with the terms of the plea and with this Court's decision in *People v Hartwick*, 498 Mich 192 (2015). We do not retain jurisdiction.

KILLMER v SABOURIN, No. 151965; Court of Appeals No. 326304. Pursuant to MCR 7.305(H)(1), in lieu of granting the application for leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to that court for reconsideration of the issues raised by the plaintiffs on the original record or, if filed, for consideration of a motion to expand the record. The panel erred in allowing the defendants to expand the record without first having moved to do so. MCR 7.210(A)(1). The application for leave to appeal as cross-appellants is denied,

because we are not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction.

SQUIER v TREES, INC, No. 152146; Court of Appeals No. 326459. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v POLL, No. 152188; Court of Appeals No. 327407. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Crawford Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v KISER, No. 152194; Court of Appeals No. 327636. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v SMALE, No. 152229; Court of Appeals No. 327610. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kalkaska Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CORA-ROSARIO, No. 152289; Court of Appeals No. 327147. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion for miscellaneous relief is denied. We do not retain jurisdiction.

Leave to Appeal Denied February 2, 2016:

PEOPLE v FEW, No. 150852; Court of Appeals No. 323894.

PEOPLE v DAVIE JONES, No. 150862; Court of Appeals No. 324457.

PEOPLE v WHEATLEY, No. 150865; Court of Appeals No. 323505.

PEOPLE v CLEMONS, No. 150870; Court of Appeals No. 324012.

PEOPLE v COOLEY, No. 150878; Court of Appeals No. 317338.

PEOPLE v WELSHANS, No. 150974; Court of Appeals No. 318040.

PEOPLE v GONSER, No. 151118; Court of Appeals No. 324482.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v ROWMOTO ROGERS, No. 151121; Court of Appeals No. 324777.

PEOPLE v QUINNEY, No. 151122; Court of Appeals No. 324834.

PEOPLE v NOBLE, No. 151123; Court of Appeals No. 324738.

PEOPLE v DAVIE JONES, No. 151126; Court of Appeals No. 322950.

PEOPLE v WALTERS, No. 151130; Court of Appeals No. 324791.

PEOPLE v SHANE, No. 151251; Court of Appeals No. 324456.

PEOPLE v ALONZO, No. 151334; Court of Appeals No. 325437.

PEOPLE v BOPP, No. 151352; Court of Appeals No. 323825.

WHITE v ST JOHN MACOMB HOSPITAL, No. 151355; Court of Appeals No. 316751.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v ESPINOSA, No. 151358; Court of Appeals No. 323959.

PEOPLE v ROLLIN, No. 151432; Court of Appeals No. 323430.

PEOPLE v FLAKES, No. 151469; Court of Appeals No. 324126.

PEOPLE v PEREZ-GARCIA, No. 151471; Court of Appeals No. 324619.

PEOPLE v SETTY, No. 151474; Court of Appeals No. 324955.

PEOPLE v ANTIONE FORD, No. 151490; Court of Appeals No. 326160.

PEOPLE v LIPPETT, No. 151510; Court of Appeals No. 324094.

PEOPLE v CURVAN, No. 151511; Court of Appeals No. 325785.

PEOPLE v SHUMPERT, No. 151517; Court of Appeals No. 325947.

PEOPLE v GAREL, No. 151519; Court of Appeals No. 326187.

PEOPLE v JASPER GREEN, No. 151526; Court of Appeals No. 323877.

PEOPLE v CLOUD, No. 151536; Court of Appeals No. 324451.

PEOPLE v TIGHE, No. 151543; Court of Appeals No. 323417.

PEOPLE v CAVIN, No. 151546; Court of Appeals No. 324481.

PEOPLE v MORADI, No. 151581; Court of Appeals No. 326286.

PEOPLE v PEAKE, No. 151582; Court of Appeals No. 324222.

PEOPLE v RAMON KING, No. 151583; Court of Appeals No. 324204.

PEOPLE v TYRONE WILLIAMS, No. 151604; Court of Appeals No. 325303.

PEOPLE v KINNEY, No. 151630; Court of Appeals No. 325948.

PEOPLE v PATILLO, No. 151645; Court of Appeals No. 325196.

PEOPLE v BUCHANAN, No. 151646; Court of Appeals No. 326372.

PEOPLE v KANE, No. 151661; Court of Appeals No. 318237.

THOMMEN v DELTA TUBE & FABRICATING CORPORATION, No. 151668; Court of Appeals No. 318354.

DELHI CHARTER TOWNSHIP v DELHI TOWNSHIP FIREFIGHTERS, No. 151669; Court of Appeals No. 320637.

PEOPLE v MCCHESTER, No. 151692; reported below: 310 Mich App 354.

KILCHERMANN v THOMPSON, No. 151696; Court of Appeals No. 320432.

PEOPLE v GROSS, No. 151743; Court of Appeals No. 318049.

FISCHER v METTLER WALLOON LLC, No. 151782; Court of Appeals No. 319361.

PEOPLE v ROSALES, No. 151784; Court of Appeals No. 326019.

PRUDENTIAL PROTECTIVE SERVICES, LLC v THE NRP GROUP, LLC, No. 151802; Court of Appeals No. 318957.

PEOPLE v MENI, No. 151852; Court of Appeals No. 319627.

CADLE COMPANY v ROBINSON, No. 151871; Court of Appeals No. 324863.

LECHNER v LECHNER, No. 151889; Court of Appeals No. 321250.

PEOPLE v FERRIER, No. 151901; Court of Appeals No. 320292.

PEOPLE v FOX, No. 151911; Court of Appeals No. 315546.

PEOPLE v WYATT, No. 151914; Court of Appeals No. 325635.

PEOPLE v SMOLEN, No. 151937; Court of Appeals No. 326528.

PEOPLE v HALO WASHINGTON, No. 151939; Court of Appeals No. 321125.

PEOPLE v DYE, No. 151977; Court of Appeals No. 325470.

PEOPLE v MASON, No. 151980; Court of Appeals No. 326262.

PEOPLE v HAMPTON, No. 151994; Court of Appeals No. 327225.

PEOPLE v JARED BROCK, No. 152010; Court of Appeals No. 325737.

DAVENPORT v HRPKA, No. 152015; Court of Appeals No. 321615.

PEOPLE v HAAN, No. 152018; Court of Appeals No. 319944.

PEOPLE v BETTINA SMITH, No. 152031; Court of Appeals No. 319943.

PEOPLE v MANIZAK, No. 152038; Court of Appeals No. 325996.

PEOPLE v RONNIE TAYLOR, No. 152050; Court of Appeals No. 320693.

WALLER v GARVER, No. 152062; Court of Appeals No. 319611.

PEOPLE v LARRY MOORE, No. 152067; Court of Appeals No. 319240.

PEOPLE v LANE, No. 152069; Court of Appeals No. 322445. On order of the Court, the application for leave to appeal the July 16, 2015 judgment of the Court of Appeals is considered and, although the Court of Appeals in this case relied on *People v Herron*, 303 Mich App 392 (2013), which this Court overruled in *People v Lockridge*, 498 Mich 358 (2015), we are not persuaded that the defendant has established a threshold showing of prejudice under *Lockridge* or that the questions presented should otherwise be reviewed by this Court. The application for leave to appeal is therefore denied.

PEOPLE v MCCOWAN, No. 152076; Court of Appeals No. 319475.

BESTEMAN v CIVIL SERVICE COMMISSION, No. 152081; Court of Appeals No. 326842.

PEOPLE v SEARS, No. 152095; Court of Appeals No. 320458.

PEOPLE v RUMBALL, No. 152100; Court of Appeals No. 325188.

PEOPLE v CURRY, No. 152105; Court of Appeals No. 320363.

PEOPLE v WOODLEY, No. 152107; Court of Appeals No. 320630.

PEOPLE v JOHN CAMPBELL, No. 152109; Court of Appeals No. 321382.

PEOPLE v CLEOPHIS HALL, No. 152117; Court of Appeals No. 319729.

PEOPLE v HAYGOOD, No. 152118; Court of Appeals No. 320467.

PEOPLE v DENGEL, No. 152122; Court of Appeals No. 319940.

PEOPLE v DEVON MILLER, No. 152123; Court of Appeals No. 327351.

PEOPLE v JACKIE HARRIS, No. 152132; Court of Appeals No. 321092.

PEOPLE v FREDERICKS, No. 152136; Court of Appeals No. 321940.

PEOPLE v TYRONE PARKER, No. 152149; Court of Appeals No. 327399.

PEOPLE v MARCELL HARRIS, No. 152153; Court of Appeals No. 327465.

PEOPLE v HINES, No. 152169; Court of Appeals No. 320623.

PEOPLE v SHAH, No. 152170; Court of Appeals No. 326747.

PEOPLE v BURGESS, No. 152172; Court of Appeals No. 327773.

PEOPLE v BLOUNT, No. 152177; Court of Appeals No. 327388.

PEOPLE v HAYES, No. 152181; Court of Appeals No. 327194.

PEOPLE v WARE, No. 152191; Court of Appeals No. 319347.

PEOPLE v ANTHONY JOHNSON, No. 152201; Court of Appeals No. 326800.

PEOPLE v HAVILAND, Nos. 152203, 152204, and 152205; Court of Appeals Nos. 327529, 327530, and 327531.

PEOPLE v SHELTON, No. 152210; Court of Appeals No. 321051.

PEOPLE v ROMERO THOMAS, No. 152213; Court of Appeals No. 321489.

PEOPLE v YORKS, No. 152214; Court of Appeals No. 327989.

LETARTE v LETARTE, No. 152216; Court of Appeals No. 326826.

PEOPLE v JONATHON MARTIN, No. 152220; Court of Appeals No. 320937.

PEOPLE v DORIAN WILLIS, No. 152221; Court of Appeals No. 319616.

PEOPLE v MCTILLMAN, No. 152224; Court of Appeals No. 321167.

PEOPLE v RAY, No. 152225; Court of Appeals No. 327691.

PEOPLE v GILMORE, No. 152234; Court of Appeals No. 326776.

NEW RIVER CONSTRUCTION, LLC v NATIONAL MANAGEMENT & PRESERVATION SERVICES, LLC, No. 152241; Court of Appeals No. 324465.

PEOPLE v PEREZ, No. 152252; Court of Appeals No. 321016.

PEOPLE v HOLT, No. 152257; Court of Appeals No. 321063.

PEOPLE v PRICE, No. 152258; Court of Appeals No. 327700.

PEOPLE v MAYFIELD, No. 152261; Court of Appeals No. 327341.

PEOPLE v LEROY LYONS, No. 152273; Court of Appeals No. 326438.

PEOPLE v GERMAIN, No. 152287; Court of Appeals No. 321524.

PEOPLE v HAWLEY, No. 152297; Court of Appeals No. 327696.

PEOPLE v THOMAS WILSON, No. 152303; Court of Appeals No. 327184.

PEOPLE v IGUS, No. 152322; Court of Appeals No. 321672.

SECURA INSURANCE v HUGHES, Nos. 152345, 152346, and 152347; Court of Appeals Nos. 320943, 321190, and 321856.

PEOPLE v BANGURAH, No. 152373; Court of Appeals No. 321381.

PEOPLE v WATTERS, No. 152376; Court of Appeals No. 319267.

PEOPLE v CARMELA JACKSON, No. 152419; Court of Appeals No. 328432.

PEOPLE v THOMAS COLE, No. 152572; Court of Appeals No. 327863.

PEOPLE v OVERTON, No. 152611; Court of Appeals No. 321727.

LAND ESCAPE OUTDOOR MAINTENANCE, LLC v INSURANCE ADVISORS, INC, No. 152614; Court of Appeals No. 321859.

ALEXANDER v COTTON CORRECTIONAL FACILITY WARDEN, No. 152665; Court of Appeals No. 329705.

GRIEVANCE ADMINISTRATOR v JACKSON, No. 152718.

PEOPLE v KADER, No. 152719; Court of Appeals No. 328437.

ALEXANDER v COTTON CORRECTIONAL FACILITY WARDEN, No. 152724; Court of Appeals No. 329705.

Reconsideration Denied February 2, 2016:

PEOPLE v COOPER, No. 148939; Court of Appeals No. 313562. Leave to appeal denied at 498 Mich 904.

MAGDICH & ASSOCIATES, PC v NOVI DEVELOPMENT ASSOCIATES, LLC, No. 149546; Court of Appeals No. 314518. Leave to appeal denied at 498 Mich 893.

WHITE v HUTZEL WOMEN'S HOSPITAL, No. 150397; Court of Appeals No. 304221. Leave to appeal denied at 498 Mich 881.

GUASTELLO v LAFON, No. 150709; Court of Appeals No. 313725. Leave to appeal denied at 498 Mich 883.

PEOPLE v BASSETT, No. 150773; Court of Appeals No. 315568. Leave to appeal denied at 498 Mich 871.

PEOPLE v BELL, No. 150779; Court of Appeals No. 322600. Leave to appeal denied at 498 Mich 871.

PEOPLE v ROGER ROBERTS, No. 150782; Court of Appeals No. 322732. Leave to appeal denied at 498 Mich 883.

In re ATTORNEY FEES OF UJLAKY, No. 150888; Court of Appeals No. 316809. Leave to appeal denied at 498 Mich 890.

PEOPLE v MELL, No. 150892; Court of Appeals No. 316808. Leave to appeal denied at 498 Mich 872.

CAMERON v HURON CLINTON METROPOLITAN AUTHORITY, No. 151114; Court of Appeals No. 318887. Leave to appeal denied at 498 Mich 872.

PEDERSEN v HURON CLINTON METROPOLITAN AUTHORITY, No. 151116; Court of Appeals No. 317898. Leave to appeal denied at 498 Mich 872.

EASLEY v INGHAM CIRCUIT JUDGE, No. 151120; Court of Appeals No. 323759. Leave to appeal denied at 498 Mich 872.

FILAS v CULPERT, No. 151198; Court of Appeals No. 317972. Leave to appeal denied at 498 Mich 872.

FILAS v CULPERT, No. 151463; Court of Appeals No. 317972. Leave to appeal denied at 498 Mich 874.

NOONAN v LANSING ORTHOPEDIC, PC, No. 151232; Court of Appeals No. 316731. Leave to appeal denied at 498 Mich 873.

WELLS FARGO BANK, NA v ISHO, No. 151482; Court of Appeals No. 324498. Leave to appeal denied at 498 Mich 885.

PEOPLE v BROYLES, No. 151556; Court of Appeals No. 326205. Summary disposition at 498 Mich 927.

PEOPLE v EDWARDS, No. 151785; Court of Appeals No. 318000. Leave to appeal denied at 498 Mich 896.

Leave to Appeal Granted February 3, 2016:

FRANK v LINKNER, No. 151888; Court of Appeals No. 318751. The parties shall include among the issues to be briefed: (1) whether MCL 450.4515(1)(e) constitutes a statute of repose, a statute of limitations, or both; and (2) when the plaintiffs' cause of action accrued.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered February 3, 2016:

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES v STATE OF MICHIGAN, No. 147511; Court of Appeals No. 304920. By order of January 29, 2014,

the application for leave to appeal the June 20, 2013 judgment of the Court of Appeals was held in abeyance pending the decisions in *UAW v Green* (Docket No. 147700) and *Mich Coalition of State Employee Unions v Michigan* (Docket No. 147758). On order of the Court, the cases having been decided on July 29, 2015, 498 Mich 282 (2015), and 498 Mich 312 (2015), respectively, the application is again considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order and shall include among the issues to be briefed whether, given that the Civil Service Commission has constitutional authority to "fix rates of compensation" for the classified service, Const 1963, art 11, § 5, and given that the relief the plaintiff requests is not available unless the Civil Service Commission reconsiders its rate-setting decision, is the plaintiff's breach of contract claim cognizable in the Court of Claims? The parties should not submit mere restatements of their application papers.

LARSEN, J. Although I intend to participate in the forthcoming oral argument on the application for leave to appeal, I did not participate in the entry of this order because the Court considered the application before I assumed office and my vote is not outcome-determinative.

CITY OF HUNTINGTON WOODS v CITY OF OAK PARK, No. 152035; reported below: 311 Mich App 96. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether, in the absence of an agreement for joint funding of a district court in districts of the third class where the court sits in only one political subdivision, all district funding units within the district have an independent obligation to fund the court; (2) whether the parties in this case agreed that the 45th District Court would be funded entirely by the City of Oak Park; and (3) whether revenue from fees collected for building operations and retiree benefits is subject to revenue sharing under MCL 600.8379(1)(c). The parties should not submit mere restatements of their application papers.

Summary Disposition February 3, 2016:

LAKIN v RUND, No. 151367; Court of Appeals No. 323695. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall consider (1) whether publication of an allegedly false and defamatory statement imputing to another conduct constituting the criminal offense of battery is actionable irrespective of special harm, see, e.g., *Mains v Whiting*, 87 Mich 172, 180 (1891); *Taylor v Kneeland*, 1 Doug 67, 72 (1843) (holding that words charging a person with a crime are not actionable per se unless the crime involves moral turpitude or would subject the person to an infamous punishment); and (2) whether the statement at issue in this case imputed to the plaintiff the criminal offense of battery.

WHITMAN v CITY OF BURTON, No. 152138; reported below: 311 Mich App 315. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate those parts of the Court of Appeals opinion holding that a plaintiff's actions or conduct, as an objective matter, must advance the public interest to entitle a plaintiff to the protection of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and that the plaintiff here failed to establish sufficient evidence of the necessary causal connection between his claimed protected activity and the alleged adverse employment action to avoid a judgment notwithstanding the verdict. In light of the Court of Appeals' holding that, pursuant to *Wurtz v Beecher Metro Dist*, 495 Mich 242 (2014), the plaintiff is not an "employee" placed to bring a claim under the WPA, resolution of these other issues was unnecessary. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to expedite proceedings is denied as moot.

Leave to Appeal Denied February 3, 2016:

PEOPLE v BRADFORD, No. 151638; Court of Appeals No. 325048.

PEOPLE v AKRAM, No. 151817; Court of Appeals No. 315402.

AUTO-OWNERS INSURANCE COMPANY v NYHOF, No. 151954; Court of Appeals No. 320256.

PEOPLE v HAROLD JOHNSON, No. 151991; Court of Appeals No. 320412.

PEOPLE v TODD ROBINSON, No. 152048; Court of Appeals No. 317282.

PEOPLE v AL-SHARA, No. 152439; reported below: 311 Mich App 560.

PEOPLE v AL-SHARA, No. 152540; Court of Appeals No. 320628.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered February 5, 2016:

MCLAIN v LANSING FIRE DEPARTMENT, No. 151421; reported below: 309 Mich App 335. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the hospital intern's medical progress notes indicating that the plaintiff's decedent had been observed with the breathing tube lodged in her esophagus were admissible evidence; and (2) if so, whether the Court of Appeals correctly ruled that even if they were admissible, the notes were insufficient to create a question of fact as to whether the defendants were grossly negligent. The parties should not submit mere restatements of their application papers.

KEMP v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 151719; Court of Appeals No. 319796. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the plaintiff's injury is closely related to the transportational function of

his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation, maintenance, or use of his motor vehicle as a motor vehicle; and (2) whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous, or but for. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 217 n 3, 225-226 (1998). The parties should not submit mere restatements of their application papers.

GRAHAM v FOSTER, No. 152058; reported below: 311 Mich App 139. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals correctly held that a necessary-party defendant may be brought into a lawsuit after the expiration of the limitations period based on the relation-back doctrine. See *Casserly v Wayne Circuit Judge*, 124 Mich 157, 161 (1900), *Prather Engineering Co v Detroit, F & S Ry Co*, 152 Mich 582, 585 (1908); but see *Miller v Chapman Contracting*, 477 Mich 102, 105 (2007) ("the relation-back doctrine does not extend to the addition of new parties"). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 5, 2016:

In re HUFFMAN, No. 152933; Court of Appeals No. 326538.

Summary Disposition February 17, 2016:

In re JONES, No. 152595; Court of Appeals No. 326252. By order of December 23, 2015, this Court granted the application for leave to appeal the October 27, 2015 judgment of the Court of Appeals. On order of the Court, the joint motions for immediate consideration and requesting this Court to vacate the circuit court order terminating the respondent's parental rights are considered, and they are granted. We vacate our December 23, 2015 order granting leave to appeal, vacate the October 27, 2015 judgment of the Court of Appeals, vacate the Ontonagon Circuit Court's order adjudicating jurisdiction over the children of the respondent mother and the February 16, 2015 order terminating the respondent's parental rights to the children, and remand this case to the circuit court for a new adjudication determination. We do not retain jurisdiction.

Leave to Appeal Denied February 19, 2016:

In re STURGIS, No. 152905; Court of Appeals No. 324127.

Reconsideration Denied February 19, 2016:

In re PRICE, No. 152788; Court of Appeals No. 327001. Leave to appeal denied 498 Mich 966.

Leave to Appeal Denied February 26, 2016:

In re COMPLAINT OF TAYLOR, No. 152784; Court of Appeals No. 327893.

Leave to Appeal Denied March 2, 2016:

LANSING PARKVIEW, LLC v K2M GROUP, LLC, No. 153099; Court of Appeals No. 328507.

Leave to Appeal Denied March 4, 2016:

SPRING HARBOR CLUB CONDOMINIUM ASSOCIATION v WRIGHT, No. 152092; Court of Appeals No. 321507.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would instead reverse the judgment of the Court of Appeals to the extent it concluded that the trial court erred by granting summary disposition in favor of defendant Greg Wright and the various entities associated with him (the Wright defendants) on plaintiffs' express warranty claims.

"[C]ontracts are to be construed in their entirety." *Perry v Sied*, 461 Mich 680, 689 (2000). Article 12 of the contract between plaintiffs and the Wright defendants expressly warrants that "all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents." It includes no time limitation. Article 21, however, provides that "[t]he Contractor shall correct any Work that fails to conform to the requirements of the Contract Documents . . . within a period of eighteen (18) months from the date of the Final Certificate of Occupancy . . . ." In my judgment, contrary to the Court of Appeals' conclusion, Articles 12 and 21 are not independent provisions, but rather refer to the same subject matter—"Work" in conformance with the "Contract Documents"—and consequently must be read together to interpret the contract in its entirety. And when read together, these articles provide that the "Contractor," i.e., the Wright defendants, expressly warrants that all "Work" will be in conformance with the "Contract Documents" and that all "Work" that is *not* in conformance with the "Contract Documents" will be corrected within 18 months following the "date of the Final Certificate of Occupancy." That is, Article 21 imposes an 18-month limitation on the express warranty set forth in Article 12. Because the 18-month limitation has long since expired, I would conclude that plaintiffs cannot proceed with their express-warranty claims against the Wright defendants.

Because I believe the Court of Appeals clearly erred by concluding that the express warranty set forth in Article 12 was not subject to the 18-month limitation set forth in Article 21, I respectfully dissent.

In re BAKER/CALLEJA, No. 153152; Court of Appeals No. 328192.

Summary Disposition March 8, 2016:

PEOPLE v JAMES WILCOX, No. 148551; Court of Appeals No. 310550. By

order of September 5, 2014, the application for leave to appeal the November 26, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073). On order of the Court, the case having been decided on July 29, 2015, 498 Mich 358 (2015), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Branch Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to hold application in abeyance is denied as moot. We do not retain jurisdiction.

PEOPLE v TERRANCE SMITH, No. 151554; Court of Appeals No. 324494. On order of the Court, the application for leave to appeal the March 24, 2015 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We leave intact the remand ordered by the Court of Appeals. With regard to the defendant's challenge to costs, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. We do not retain jurisdiction.

PEOPLE v CARTER, Nos. 151591 and 151592; Court of Appeals Nos. 317812 and 317828. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand these cases to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have

imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v EMMANUEL BROWN, No. 151641; Court of Appeals No. 317376. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Macomb Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge* (Docket No. 149073), 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The motion for appointment of counsel in this Court is denied as moot. We do not retain jurisdiction.

PEOPLE v MEDLEY, No. 152099; Court of Appeals No. 320089. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *People v Lockridge*, 498 Mich 358 (2015).

PEOPLE v JOSEPH JORDAN, No. 152131; Court of Appeals No. 320555. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ATWOOD, No. 152142; Court of Appeals No. 326912. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court for the appointment of substitute appellate counsel in light of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Based on our review of the record, after the circuit court granted original appointed appellate counsel's

motion to withdraw, it erred in failing to appoint substitute appellate counsel when the defendant's original appellate counsel did not accompany his motion to withdraw with legal analysis "referring to anything in the record that might arguably support the appeal," and the trial court failed to make a finding whether the "case is wholly frivolous." *Anders v California*, 386 US 738, 744; 87 S Ct 1396, 1400; 18 L Ed 2d 493 (1967); see also MCR 7.211(C)(5) and AO 2004-6, Standard 5. On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. The motion to reissue judgment and appoint counsel is denied as moot. We do not retain jurisdiction.

PEOPLE v ZAHRAIE, No. 152212; Court of Appeals No. 321835. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion for an order adjourning the case is denied. We do not retain jurisdiction.

PEOPLE v GRINSTEAD, No. 152280; Court of Appeals No. 327917. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. The defendant is entitled to jail credit for the period of time he was incarcerated and unable to post bond. MCL 769.11b. Irrespective of whether the trial court resentences the defendant, the court shall amend the judgment of sentence to award appropriate jail credit. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DECENT, No. 152327; Court of Appeals No. 327760. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court

would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. The defendant is entitled to jail credit for the period of time he was incarcerated and unable to post bond. MCL 769.11b. Irrespective of whether the trial court resentences the defendant, the court shall amend the judgment of sentence to award appropriate jail credit. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v JOHN BROWN, No. 152369; Court of Appeals No. 318675. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for further proceedings. We do not disturb that part of the Court of Appeals judgment ordering the trial court, on remand, to resentence the defendant or find facts to support the scoring of OV 13, MCL 777.43. If the trial court does not resentence the defendant, but instead finds facts that support the scoring of OV 13, it shall then determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). The trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v IVEY, No. 152486; Court of Appeals No. 327512. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied March 8, 2016:

PEOPLE v BOWNE, No. 150639; Court of Appeals No. 316283.

PEOPLE v VELTHUYSEN, No. 150708; Court of Appeals No. 322276.

PEOPLE v WHEELER, No. 151108; Court of Appeals No. 324092.

BLACKWARD PROPERTIES, LLC v SOWER, No. 151112; Court of Appeals No. 313282.

POSEN CONSTRUCTION, INC v CITY OF DEARBORN, No. 151177; Court of Appeals No. 311214.

PEOPLE v LOWN, No. 151227; Court of Appeals No. 322796.

PEOPLE v SLOUGH, No. 151500; Court of Appeals No. 322664.

PEOPLE v FYKE, No. 151534; Court of Appeals No. 324657.

PEOPLE v DOZIER, No. 151585; Court of Appeals No. 326037.

PEOPLE v ODEN, No. 151589; Court of Appeals No. 324851.

In re APPLICATION OF DETROIT EDISON COMPANY, No. 151635; Court of Appeals No. 316781.

PEOPLE v QUINCY ROBERTS, No. 151660; Court of Appeals No. 325545.

PEOPLE v PUTMAN, No. 151662; Court of Appeals No. 325096.

PEOPLE v MARKS, No. 151665; Court of Appeals No. 325846.

PEOPLE v DELPIANO, No. 151683; Court of Appeals No. 325232.

PEOPLE v METZELBURG, No. 151691; Court of Appeals No. 325583.

PEOPLE v SHANKS, No. 151693; Court of Appeals No. 326315.

PEOPLE v JOSHUA WILLIAMS, No. 151724; Court of Appeals No. 327090.

ROTH v ROTH, No. 151728; Court of Appeals No. 324180.

PEOPLE v STREETS, No. 151735; Court of Appeals No. 326161.

PEOPLE v DARRYL WARREN, No. 151737; Court of Appeals No. 318968.

PEOPLE v ISMAIL, No. 151750; Court of Appeals No. 326214.

PEOPLE v GRAHAM, No. 151753; Court of Appeals No. 325669.

PEOPLE v KEVIN EVANS, No. 151756; Court of Appeals No. 325874.

PEOPLE v SAWVEL, No. 151763; Court of Appeals No. 325433.

PEOPLE v HERNANDEZ-CORREA, No. 151768; Court of Appeals No. 326234.

PEOPLE v MILANO, No. 151781; Court of Appeals No. 318782.

PEOPLE v RICKIE BROWN, No. 151796; Court of Appeals No. 318914.

PEOPLE v HEMINGWAY, No. 151878; Court of Appeals No. 320783.

PEOPLE v CORY NELSON, No. 151895; Court of Appeals No. 318607.

MORAN v OLG II, LLC, No. 151942; Court of Appeals No. 323749.

PEOPLE v JAKWUAN SCOTT, No. 151975; Court of Appeals No. 320232.

BURKHARDT v CITY OF LANSING, No. 152021; Court of Appeals No. 319853.

LUCRE, INC v CITY OF GRAND RAPIDS, No. 152065; Court of Appeals No. 319781.

ROTH v ROTH, No. 152071; Court of Appeals No. 326164.

PEOPLE v LUNSFORD, No. 152089; Court of Appeals No. 327464.

PEOPLE v OROSCO, No. 152093; Court of Appeals No. 319523.

PEOPLE v HARDESTY, No. 152096; Court of Appeals No. 320627.

PEOPLE v SLUSHER, No. 152101; Court of Appeals No. 318672.

PEOPLE v MICHAEL KING, No. 152127; Court of Appeals No. 320324.

PEOPLE v GARY, No. 152128; Court of Appeals No. 327537.

PEOPLE v LARKIN, No. 152130; Court of Appeals No. 327033.

PEOPLE v GRAY, No. 152143; Court of Appeals No. 321441.

PEOPLE v MARKOWICZ, No. 152174; Court of Appeals No. 328187.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v MARKOWICZ, No. 152176; Court of Appeals No. 328189.

PEOPLE v FRANKLIN ANDERSON, No. 152179; Court of Appeals No. 327177.

PEOPLE v STEPHEN WHITE, Nos. 152185 and 152186; Court of Appeals Nos. 320113 and 320289.

CIENA HEALTHCARE MANAGEMENT v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 152197; Court of Appeals No. 321066.

REID v HURLEY MEDICAL CENTER, No. 152215; Court of Appeals No. 324883.

ROSS v VAN ORNUM ESTATE, No. 152222; Court of Appeals No. 319818.

PEOPLE v ALFORD, No. 152233; Court of Appeals No. 319337.

PEOPLE v FULTON, No. 152236; Court of Appeals No. 325830.

GLENN v YARBROUGH, No. 152248; Court of Appeals No. 322537.

In re BENTLEY ESTATE, No. 152270; Court of Appeals No. 321079.

PEOPLE v SANTIAGO-BAUTISTA, No. 152275; Court of Appeals No. 328224.

PEOPLE v HATCH, No. 152276; Court of Appeals No. 321038.

PEOPLE v MARKOVICH, No. 152277; Court of Appeals No. 320982.

PEOPLE v KATT, No. 152278; Court of Appeals No. 321698.

PEOPLE v CAMERON, No. 152281; Court of Appeals No. 320592.

TERRY v FEDERAL NATIONAL MORTGAGE ASSOCIATION, No. 152283; Court of Appeals No. 321141.

PEOPLE v OVERBEEK, No. 152290; Court of Appeals No. 319951.

PEOPLE v GOREE, No. 152296; Court of Appeals No. 328361.

PEOPLE v ANTHONY EVANS, No. 152299; Court of Appeals No. 327781.

PEOPLE v PORRAS, No. 152305; Court of Appeals No. 321183.

PEOPLE v LUMPKINS, No. 152308; Court of Appeals No. 321844.

PEOPLE v BARRY, No. 152312; Court of Appeals No. 321330.

PEOPLE v DAJUAN JOHNSON, No. 152314; Court of Appeals No. 321559.

SUTTON v WILLIAMS, No. 152315; Court of Appeals No. 320090.

PEOPLE v CRUMP, No. 152318; Court of Appeals No. 327778.

In re RAISBECK, No. 152320; Court of Appeals No. 327343.

PEOPLE v GARTH, No. 152325; Court of Appeals No. 327735.

PEOPLE v DEVIN WILLIS, No. 152351; Court of Appeals No. 328715.

POTTERVILLE EDUCATION ASSOCIATION MEA/NEA v POTTERVILLE PUBLIC SCHOOLS BOARD OF EDUCATION, No. 152368; Court of Appeals No. 319880.

PEOPLE v LONNIE WALKER, No. 152375; Court of Appeals No. 321707.

PEOPLE v ANGELA TANNER, No. 152382; Court of Appeals No. 327940.

PEOPLE v DUNN, No. 152387; Court of Appeals No. 328513.

JPMORGAN MORTGAGE ACQUISITION CORPORATION v CEDRIC WILLIAMS, No. 152392; Court of Appeals No. 326577.

PEOPLE v HUMPHREY, No. 152396; reported below: 312 Mich App 309.

PEOPLE v HENRY WILLIAMS, No. 152403; Court of Appeals No. 318609.

PEOPLE v KILE, No. 152411; Court of Appeals No. 328216.

DETROIT EDISON COMPANY v STENMAN, No. 152418; reported below: 311 Mich App 367.

PEOPLE v DERRIAN JACKSON, No. 152421; Court of Appeals No. 328395.

PEOPLE v RADZWION, No. 152422; Court of Appeals No. 327278.

PEOPLE v WILLIAM DENNIS, No. 152431; Court of Appeals No. 321191.

KETCHMARK v HAYMAN, No. 152432; Court of Appeals No. 321201.

PEOPLE v VANATTA, No. 152436; Court of Appeals No. 328142.

PEOPLE v HEMPHILL, No. 152451; Court of Appeals No. 321485.

PEOPLE v KITCHEN, No. 152453; Court of Appeals No. 327659.

PEOPLE v LARRY STOKES, No. 152459; Court of Appeals No. 327561.

PEOPLE v POINDEXTER, No. 152463; Court of Appeals No. 328159.

PEOPLE v BOBBY TAYLOR, No. 152487; Court of Appeals No. 320085.

PEOPLE v RICHARDS, No. 152494; Court of Appeals No. 328549.

PEOPLE v TRISTAN DUPREE, No. 152503; Court of Appeals No. 328336.

PEOPLE v DEVONTE WARREN, No. 152505; Court of Appeals No. 322455.

DINOTO v WASHINGTON TOWNSHIP, No. 152517; Court of Appeals No. 328517.

PEOPLE v SANTEZ JONES, No. 152521; Court of Appeals No. 320325.

PEOPLE v JIMMY JOHNSON, No. 152525; Court of Appeals No. 328608.

PEOPLE v MCCAA, No. 152549; Court of Appeals No. 328782.

PEOPLE v LARRY JONES, No. 152730; Court of Appeals No. 328730.

VESSELS v VESSELS, No. 152754; Court of Appeals No. 322122.

PEOPLE v RAISBECK, No. 152828; reported below: 312 Mich App 759.

PEOPLE v PHILLIPS, No. 152850; Court of Appeals No. 326005.

COSTON v COSTON, No. 152865; Court of Appeals No. 327395.

PETTY v ARNOLD, No. 152877; Court of Appeals No. 327507.

PEOPLE v BRUNT, No. 153023; Court of Appeals No. 329741.

Superintending Control Denied March 8, 2016:

LYONS v ATTORNEY GRIEVANCE COMMISSION, No. 152183.

BUCHANAN v ATTORNEY GRIEVANCE COMMISSION, No. 152420.

Reconsideration denied March 8, 2016:

PEOPLE v HERRON, No. 148677; summary disposition at 498 Mich 901; reported below: 303 Mich App 392.

PEOPLE v ALAN WOOD, No. 150684; Court of Appeals No. 315379. Summary disposition at 498 Mich 914.

PEOPLE v HUSSAIN, No. 150802; Court of Appeals No. 323758. Leave to appeal denied at 498 Mich 918.

PEOPLE v WEST, No. 150999; Court of Appeals No. 317109. Leave to appeal denied at 498 Mich 919.

PEOPLE v BOWLING, No. 151085; Court of Appeals No. 324613. Leave to appeal denied at 498 Mich 919.

PEOPLE v GUNNELLS, No. 151096; Court of Appeals No. 317326. Summary disposition at 498 Mich 926.

LAKELAND HOSPITALS AT NILES AND ST JOSEPH, INC v AUTO-OWNERS INSURANCE COMPANY, No. 151292; Court of Appeals No. 318440. Leave to appeal denied at 498 Mich 932.

HARGROW v DEUTSCHE BANK TRUST COMPANY AMERICAS, No. 151366; Court of Appeals No. 324036. Leave to appeal denied at 498 Mich 919.

MCNEES v OWENS, No. 151436; Court of Appeals No. 324175. Leave to appeal denied at 498 Mich 855.

PEOPLE v MCCOY, No. 151485; Court of Appeals No. 318820. Leave to appeal denied at 498 Mich 919.

TAYLOR v MCCARTHY, No. 151523; Court of Appeals No. 317766. Leave to appeal denied at 498 Mich 919.

THOR REAL ESTATE, LLC v SHANNON, No. 151580; Court of Appeals No. 323600. Leave to appeal denied at 498 Mich 920.

COMPAU v PIONEER RESOURCE COMPANY, LLC, No. 151618; Court of Appeals No. 320615. Leave to appeal denied at 498 Mich 928.

PEOPLE v BRAND, No. 151786; Court of Appeals No. 319090. Leave to appeal denied at 498 Mich 921.

PEOPLE v VILLANUEVA, No. 151825; Court of Appeals No. 326498. Leave to appeal denied at 498 Mich 907.

PEOPLE v DOHERTY, No. 151926; Court of Appeals No. 319391. Leave to appeal denied at 498 Mich 921.

Summary Disposition March 9, 2016:

PEOPLE v ENGLISH, No. 153084; Court of Appeals No. 330389. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand

this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue is presented in *People v Smith* (Docket No. 153085), which we remanded to the Court of Appeals for consideration as on leave granted by order dated March 9, 2016.

PEOPLE v BRANDON SMITH, No. 153085; Court of Appeals No. 330390. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue is presented in *People v English* (Docket No. 153084), which we remanded to the Court of Appeals for consideration as on leave granted by order dated March 9, 2016.

Leave to Appeal Denied March 11, 2016:

JONES v MANVILLE, No. 152678; Court of Appeals No. 324263.

Leave to Appeal Denied March 16, 2016:

PEOPLE v RUMPF, No. 153203; Court of Appeals No. 331000.

Leave to Appeal Denied March 18, 2016:

PEOPLE v KILGO, No. 151076; Court of Appeals No. 325582. On January 13, 2016, the Court heard oral argument on the application for leave to appeal prior to decision by the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

In re GONZALEZ, No. 153218; Court of Appeals No. 328854.

Leave to Appeal Denied March 22, 2016:

PEOPLE v PEAY, No. 153344; Court of Appeals No. 331081.

Summary Disposition March 23, 2016:

PEOPLE v LACOSSE, No. 150447; Court of Appeals No. 310987. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Livingston Circuit Court to determine whether it took the challenged information regarding the defendant's parents in the PSIR into account at sentencing. If the court determines that the challenged information was either inaccurate or irrelevant to the defendant's sentence, the court shall direct the probation officer to correct or delete the challenged information from the PSIR as required by

MCR 6.425(E)(2)(a) and assure that a corrected copy of the report is prepared and transmitted to the Michigan Department of Corrections per MCR 6.425 and MCL 771.14(6). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE V NAWWAS, No. 151382; Court of Appeals No. 319039. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Wayne Circuit Court, and, based on the prosecutor's response confessing error and stating that the defendant is entitled to resentencing, we remand this case to the trial court for resentencing. The Sentencing Information Report indicates that the trial court only scored the sentencing guidelines for the defendant's violation of MCL 750.227. "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135 (2009). The trial court erred in scoring offense variable 9, MCL 777.39, based on a finding that two to nine victims were placed in danger of physical injury or death in relation to the defendant's violation of MCL 750.227. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

SUTTER V OCWEN LOAN SERVICING, LLC, No. 152006; Court of Appeals No. 320704. On order of the Court, the application for leave to appeal the April 21, 2015 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court to reconsider whether the plaintiffs' complaint stated a legally cognizable claim of statutory conversion under MCL 600.2919a(1)(a). *Hofweber v Detroit Trust Co*, 295 Mich 96, 100 (1940). The Court of Appeals erred by failing to limit its review to the allegations contained in the complaint and by failing to recognize the appropriate standard for reviewing the sufficiency of a pleading. See MCR 2.111(B)(1); *Steed v Covey*, 355 Mich 504, 511 (1959). We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 23, 2016:

In re CLIFFMAN ESTATE, No. 151998; Court of Appeals No. 321174. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether MCL 600.2922(3)(b) allows stepchildren of a decedent to make a claim for damages where the natural parent predeceased the decedent, and if so, whether this Court should overrule *In re Combs Estate*, 257 Mich App 622 (2003). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 23, 2016:

CADWELL v CITY OF HIGHLAND PARK, No. 151919; Court of Appeals No. 318430.

DATAM MANUFACTURING, LLC v MAGNA POWERTRAIN USA, INC, No. 151989; Court of Appeals No. 325136.

PEOPLE v DARON EVANS, No. 152228; Court of Appeals No. 321909.

BERG v MUNOZ, Nos. 152250 and 152251; Court of Appeals Nos. 321162 and 321645.

MARKMAN, J. I would reverse the judgment of the Court of Appeals and reinstate the circuit court judgments granting the defendants' motions for summary disposition and for sanctions.

BERG v MUNOZ, Nos. 152253 and 152254; Court of Appeals Nos. 321162 and 321645.

MARKMAN, J. I would reverse the judgment of the Court of Appeals and reinstate the circuit court judgments granting the defendants' motions for summary disposition and for sanctions.

PEOPLE v TERRENCE HOBBS, No. 152266; Court of Appeals No. 327690.

In re AWG, No. 153069; Court of Appeals No. 327976.

Leave to Appeal Denied March 25, 2016:

JONES v SENNETT, No. 153076; Court of Appeals No. 329834.

Summary Disposition March 29, 2016:

PEOPLE v KENNETH ANDERSON, No. 149626; Court of Appeals No. 321055. By order of April 28, 2015, the application for leave to appeal the June 3, 2014 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court for the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*; *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to stay the proceedings is denied. The motion to compel the prosecutor to produce exculpatory materials is denied. We do not retain jurisdiction.

PEOPLE v TROY JONES, Nos. 150488 and 150489; Court of Appeals Nos. 315582 and 315713. Pursuant to MCR 7.305(H)(1), in lieu of granting

leave to appeal, we remand these cases to the Allegan Circuit Court to determine whether the court would have imposed materially different sentences under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. The trial court shall also consider the defendant's argument concerning the imposition of costs, and determine whether costs should be imposed and the amount, if any, that should be assessed. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion for bond pending appeal is denied. We do not retain jurisdiction.

PEOPLE v DESHAWN STARKS, Nos. 150967 and 150968; Court of Appeals Nos. 324218 and 324219. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand these cases to the Wayne Circuit Court to determine whether the court would have imposed materially different sentences under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v YOLANDA SIMPSON, No. 150981; Court of Appeals No. 324176. By order of November 24, 2015, the application for leave to appeal the December 11, 2014 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*, and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v JEROME WALKER, No. 151002; Court of Appeals No. 324638. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). The motion to hold application in

abeyance is treated as a motion to add issue and is granted. The motions for peremptory reversal and for stay are denied. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

PEOPLE v ATKINS, No. 151057; Court of Appeals No. 324953. By order of December 22, 2015, the application for leave to appeal the January 21, 2015 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court for the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*; *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v WALTER JONES, No. 151125; Court of Appeals No. 325016. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court for the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction under MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US __; 136 S Ct 718; 193 L Ed 2d 599 (2016). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v LEANDER FOSTER, No. 151300; Court of Appeals No. 324440. By order of December 22, 2015, the application for leave to appeal the March 4, 2015 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court for the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*; *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v HOGANS, No. 151402; Court of Appeals No. 324521. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's November 7, 2014 delayed application for leave to appeal under the

standard applicable to direct appeals. Counsel was timely requested and appointed on direct review, but waited until only two months remained before expiration of the time for seeking leave to appeal, MCR 7.205(F), before moving to withdraw for lack of appealable issues, without following the proper procedure under *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967). Counsel was permitted to withdraw with approximately one month left in the direct review period. New counsel did raise issues on the defendant's behalf; however, new counsel was not appointed until after the deadline. Accordingly, whether from ineffective assistance of counsel or delays in the trial court, the defendant was deprived of his direct appeal. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). We do not retain jurisdiction.

PEOPLE V HICKS, No. 151547; Court of Appeals No. 324343. On order of the Court, the application for leave to appeal the March 19, 2015 order of the Court of Appeals is considered. With regard to the defendant's challenge to costs, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we order that, in addition to the proceedings ordered by the Court of Appeals, the Wayne Circuit Court shall also determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V DESHAWN STARKS, No. 151577; Court of Appeals No. 324220. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We leave intact the remand ordered by the Court of Appeals. With regard to the defendant's challenge to costs, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. In all other respects, leave to appeal is denied because we are

not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v KEVIN ROBINSON, No. 151791; Court of Appeals No. 326023. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Muskegon Circuit Court for the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

PEOPLE v KINCAID, No. 151840; Court of Appeals No. 325814. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we grant the defendant's motion to lift the Wayne Circuit Court's November 4, 2013 stay (abeyance) order, vacate the sentences of the Wayne Circuit Court on the defendant's three first-degree murder convictions, and remand this case to the trial court for resentencing on those convictions pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). We do not retain jurisdiction.

PEOPLE v THOMAS DARBY, No. 151882; Court of Appeals No. 317576. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358, 388-389 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v HALLAK, No. 152005; reported below: 310 Mich App 555. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Eaton Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court

determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v BLACKWELL, No. 152133; Court of Appeals No. 320995. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Eaton Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v WATSON, No. 152434; Court of Appeals No. 320328. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied March 29, 2016:

PEOPLE v OLSON, No. 150135; Court of Appeals No. 321882.

PEOPLE v DUMAS, No. 150860; Court of Appeals No. 323462.

PEOPLE v MICHAEL HARRIS, No. 151290; Court of Appeals No. 325503.

PEOPLE v BEALS, No. 151364; Court of Appeals No. 325643.

PEOPLE v OSWALD, No. 151390; Court of Appeals No. 325707.

PEOPLE v MICHAEL WARD, No. 151397; Court of Appeals No. 325466.

PEOPLE v ANTONIO STAPLETON, No. 151440; Court of Appeals No. 325501.

PEOPLE v BOSWELL, No. 151449; Court of Appeals No. 325648.

PEOPLE v RAINES, No. 151470; Court of Appeals No. 325832.

PEOPLE v BODMAN, No. 151649; Court of Appeals No. 325644.

PEOPLE v ADANTI, No. 151653; Court of Appeals No. 324694.

PEOPLE v JAMAL KING, No. 151697; Court of Appeals No. 325695.

PEOPLE v EALY, No. 151708; Court of Appeals No. 326015.

PEOPLE v MARSHALL, No. 151713; Court of Appeals No. 325833.

PEOPLE v REYNOLDS, No. 151723; Court of Appeals No. 324039.

PEOPLE v HANSEN, No. 151752; Court of Appeals No. 325305.

PEOPLE v RICKY MOORE, No. 151761; Court of Appeals No. 325929.

PEOPLE v GUYNN, No. 151794; Court of Appeals No. 325304.

PEOPLE v KENNETH WILLIAMS, No. 151797; Court of Appeals No. 319595.

AMTOWER v MAZUREK, No. 151810; Court of Appeals No. 325026.

PEOPLE v FRAZIER, No. 151820; Court of Appeals No. 326650.

PEOPLE v HAHN, No. 151856; Court of Appeals No. 326040.

PEOPLE v FIELDS, No. 151861; Court of Appeals No. 327021.

PLETOS v LAKE IN THE WOODS HOMEOWNERS ASSOCIATION, No. 151961; Court of Appeals No. 319087.

PEOPLE v NORMAN, No. 151990; Court of Appeals No. 326545.

PEOPLE v IVES, No. 152000; Court of Appeals No. 319687.

PEOPLE v MICHAEL DARBY, No. 152053; Court of Appeals No. 317849.

TOWARD v CITY OF WARREN, No. 152091; Court of Appeals No. 319858.

DENHOF v COVELLO, No. 152145; Court of Appeals No. 326917.

DENHOF v COVELLO, No. 152147; Court of Appeals No. 326929.

PEOPLE v BILLINGHIRE, No. 152160; Court of Appeals No. 320951.

PEOPLE v MILES LEE, No. 152164; Court of Appeals No. 326601.

BUTTON v OAKLAND LIVINGSTON HUMAN SERVICE AGENCY, No. 152173; Court of Appeals No. 326386.

KERBYSON v ELBA TOWNSHIP, No. 152187; Court of Appeals No. 319034.

BUCK v CITY OF HIGHLAND PARK, No. 152192; Court of Appeals No. 320967.

DENHOF v CHALLA, No. 152195; reported below: 311 Mich App 499.

CLAY v DOE, No. 152198; reported below: 311 Mich App 359.

PEOPLE v STEVENS, No. 152235; Court of Appeals No. 320489.

GARCIA v WEST SHORE MEDICAL CENTER, No. 152245; Court of Appeals No. 320781.

PEOPLE v HOLMAN, No. 152256; Court of Appeals No. 321918.

PEOPLE v GOGINS, No. 152264; Court of Appeals No. 325682.

PEOPLE v TYRONE SMITH, No. 152272; Court of Appeals No. 319977.

PEOPLE v HOGAN, No. 152286; Court of Appeals No. 327757.

PEOPLE v FARHAT, No. 152309; Court of Appeals No. 321847.

PEOPLE v WHEAT, No. 152316; Court of Appeals No. 327921.

PEOPLE v HUTCHISON, No. 152324; Court of Appeals No. 327790.

LALONE v RIEDSTRA DAIRY LTD, No. 152337; Court of Appeals No. 320774.

MURPHY-DUBAY v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, Nos. 152348 and 152349; reported below: 311 Mich App 539.

PEOPLE v EDWIN JAMERSON, No. 152352; Court of Appeals No. 328439.

PEOPLE v SHACKLEFORD, No. 152362; Court of Appeals No. 328051.

CARROLL v DEPARTMENT OF CORRECTIONS, No. 152379; Court of Appeals No. 328204.

PEOPLE v PITTMAN, No. 152381; Court of Appeals No. 317461.

PEOPLE v WINTERS, No. 152386; Court of Appeals No. 320739.

PEOPLE v DIXON, No. 152393; Court of Appeals No. 317219.

PEOPLE v BETLEM, No. 152395; Court of Appeals No. 320690.

PEOPLE v SHINE, No. 152398; Court of Appeals No. 321763.

PEOPLE v SNETHKAMP, No. 152415; Court of Appeals No. 328183.

PEOPLE v ROLLINS, No. 152438; Court of Appeals No. 321488.

PEOPLE v HUMPHRIES, No. 152440; Court of Appeals No. 320633.

PEOPLE v CASTEEL, No. 152446; Court of Appeals No. 321340.

PEOPLE v TROY JONES, No. 152447; Court of Appeals No. 327228.

PEOPLE v DICKENS, No. 152449; Court of Appeals No. 321377.

PEOPLE v CRONK, No. 152468; Court of Appeals No. 321286.

STOKES v ADAM OIL, LLC, No. 152477; Court of Appeals No. 321855.

PEOPLE v RONALD WASHINGTON, No. 152482; Court of Appeals No. 328345.

In re DINO RIGONI INTENTIONAL GRANTOR TRUST, No. 152488; Court of Appeals No. 321589.

NEW COVERT GENERATING COMPANY LLC v COVERT TOWNSHIP, No. 152489; Court of Appeals No. 320877.

DEUTSCHE BANK NATIONAL TRUST COMPANY v SACO, No. 152491; Court of Appeals No. 327306.

PEOPLE v KENTREZE WHITE, No. 152497; Court of Appeals No. 328485.

PEOPLE v OWENS, No. 152506; Court of Appeals No. 321639.

PEOPLE v VOGEL, No. 152508; Court of Appeals No. 328713.

PEOPLE v ANGLEMYER, No. 152509; Court of Appeals No. 328618.

PEOPLE v CERVANTES CARSON, No. 152510; Court of Appeals No. 328413.

BROWN v BORGESS MEDICAL CENTER, No. 152515; Court of Appeals No. 327653.

KREFT v COOK, No. 152520; Court of Appeals No. 321860.

AMERICAN ERECTORS, INC v MCNISH GROUP, INC, No. 152524; Court of Appeals No. 322799.

PEOPLE v FLEMING, No. 152528; Court of Appeals No. 317040.

PEOPLE v MIGHTY, No. 152536; Court of Appeals No. 328259.

NAGLE v HERTZ SCHRAM, PC, Nos. 152538 and 152539; Court of Appeals Nos. 320137 and 320138.

PEOPLE v GRUDZINSKAS, No. 152542; Court of Appeals No. 328750.

PEOPLE v WENTWORTH, No. 152551; Court of Appeals No. 328632.

CHARTER TOWNSHIP OF CLINTON v FRANCALA, No. 152560; Court of Appeals No. 329336.

ROWE v G ROBERT COTTON CORRECTIONAL FACILITY WARDEN, No. 152561; Court of Appeals No. 327839.

PEOPLE v CONSTANCE JOHNSON, No. 152564; Court of Appeals No. 327883.

In re TOCARCHICK, No. 152569; Court of Appeals No. 328970.

PLATINUM FINANCIAL SERVICES, CORP v MIDDLETON, No. 152577; Court of Appeals No. 327822.

PEOPLE v LAMAR DAVIS, No. 152583; Court of Appeals No. 324481.

PEOPLE v GIACHETTI, No. 152587; Court of Appeals No. 328567.

PEOPLE v TRE DEVON JOHNSON, No. 152589; Court of Appeals No. 321575.

PEOPLE v MARK JONES, No. 152591; Court of Appeals No. 321986.

HARTIGAN v THE GOLD REFINERY, LLC, No. 152594; Court of Appeals No. 321506.

PEOPLE v CHITWOOD, No. 152651; Court of Appeals No. 329216.

PEOPLE v LANGSTON, No. 152661; Court of Appeals No. 321653.

PEOPLE v BRASSFIELD, No. 152663; Court of Appeals No. 321935.

PEOPLE v KENNETH SCOTT, No. 152673; Court of Appeals No. 320321.

PEOPLE v SCHRAM, No. 152681; Court of Appeals No. 328958.

PEOPLE v JOSEPH HALL, No. 152699; Court of Appeals No. 321587.

PEOPLE v BRANDON JOHNSON, No. 152702; Court of Appeals No. 329000.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BOZELL, No. 152721; Court of Appeals No. 328843.

PEOPLE v BERRY, No. 152735; Court of Appeals No. 329008.

PEOPLE v PETER DENNIS, No. 152765; Court of Appeals No. 321852.

PEOPLE v WILLIAM SCOTT, No. 152779; Court of Appeals No. 328991.

PEOPLE v BANKS, No. 152838; Court of Appeals No. 319889.

KRETZ v TECUMSEH LAWN & LANDSCAPING, INC, No. 152890; Court of Appeals No. 327242.

COLEMAN v DEPARTMENT OF CORRECTIONS, No. 152969; Court of Appeals No. 327458.

PEOPLE v DEMYRON ROBINSON, No. 153020; Court of Appeals No. 322731.

PEOPLE v TROY JONES, No. 153029; Court of Appeals No. 328938.

PEOPLE v HATTEN, No. 153052; Court of Appeals No. 329044.

PEOPLE v CHRISTOPHER HENDERSON, No. 153163; Court of Appeals No. 312210.

PEOPLE v PHILLIPS, No. 153172; Court of Appeals No. 329718.

PEOPLE v SHEPERD, No. 153192; Court of Appeals No. 312795.

Superintending Control Denied March 29, 2016:

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 152437.

MARION v ATTORNEY GRIEVANCE COMMISSION, No. 152467.

MCNULTY v ATTORNEY GRIEVANCE COMMISSION, No. 152556.

MOTLEY v ATTORNEY GRIEVANCE COMMISSION, No. 152593.

REID v ATTORNEY GRIEVANCE COMMISSION, No. 152649.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 152797.

Reconsideration Denied March 29, 2016:

PEOPLE v CARROLL, No. 151066; Court of Appeals No. 317174. Leave to appeal denied at 498 Mich 884.

GRONINGER v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 151179; Court of Appeals No. 318380. Leave to appeal denied at 498 Mich 884.

PEOPLE v FLINT, No. 151189; Court of Appeals No. 321213. Leave to appeal denied at 498 Mich 884.

Summary Disposition March 30, 2016:

In re APPLICATION OF CONSUMERS ENERGY COMPANY, No. 150395; reported below 307 Mich App 32. On January 13, 2016, the Court heard oral argument on the application for leave to appeal the September 25, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we affirm on alternate grounds the result reached by the Court of Appeals in affirming the Michigan Public Service Commission's (MPSC) determination that the appellant was not allowed to recover the cost of purchasing NO_x allowances. The exception to the $1 million recovery limit provided in MCL 460.6a(8) applies to "costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented" after the effective date of the statute, which was October 6, 2008. Here, the MPSC correctly concluded that no change in state law took place after October 6, 2008, because no statute was enacted and no rule was promulgated after that date. Because there had been no change in the law, the exception to the recovery limit was simply inapplicable. We therefore vacate that part of the Court of Appeals judgment in Docket No. 305066 regarding the meaning of the term "implemented." Given that there was no change in the law, there was no need for the panel to resolve that issue. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

LARSEN, J. (*dissenting*). I respectfully dissent from the Court's order in this case. I would reverse the judgment of the Court of Appeals and remand this case to the Public Service Commission for further proceedings.

MCL 460.6a(8) provides that the inflation-adjusted limit for recovery of an energy plant's fuel and variable operation and maintenance costs

does not apply to "costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after" October 6, 2008. The Court of Appeals majority erred by conflating the implementation of the nitrogen oxide regulations at issue in this case with the legal effective date of those regulations. A majority of this Court also errs by requiring the "change[] in [the] federal or state environmental law[] or regulation[]" to have occurred after October 6, 2008. Both of these readings of MCL 460.6a(8) fail to take into account that changes to regulatory and legal schemes often are put into effect over an extended period of time, and the Legislature recognized this by using the word "implemented" in MCL 460.6a(8). As a result, even though the regulations at issue here were promulgated and had a legal effective date before October 6, 2008, they were not "implemented" until 2009, when they imposed new restrictions on appellant's nitrogen oxide emissions.

VIVIANO, J., joined the statement of LARSEN, J.

DOE v DEPARTMENT OF CORRECTIONS, Nos. 152406 and 152435; reported below: 312 Mich App 97. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion considering whether the defendants were precluded, under principles of collateral estoppel, from arguing that the 1999 amendment to the Civil Rights Act, MCL 37.2301(b), is constitutional and whether the 1999 amendment to the Civil Rights Act violates equal protection. In light of the Court of Appeals ruling that plaintiffs' complaint should be dismissed under the Prisoner Litigation Reform Act, MCL 600.5501 *et seq*., it was unnecessary to resolve the remaining issues. In all other respects, the applications for leave to appeal are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Granted March 30, 2016:

LOWERY v ENBRIDGE ENERGY LIMITED PARTNERSHIP, No. 151600; Court of Appeals No. 319199. The parties shall include among the issues to be briefed: (1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation. See *Genna v Jackson*, 286 Mich App 413 (2009).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 30, 2016:

PEOPLE v FRANKLIN, No. 152840; Court of Appeals No. 322655. The parties shall file supplemental briefs within 42 days of the date of this

order addressing whether the Court of Appeals erred in concluding that *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), limited the trial court's discretion to order a hearing on the sufficiency of the affidavit in support of the search warrant. The parties should not submit mere restatements of their application papers.

Leave to Appeal Before Decision of the Court of Appeals Denied March 30, 2016:

O'CONNELL v DIRECTOR OF ELECTIONS, No. 153414; Court of Appeals No. 332132.

Leave to Appeal Denied March 30, 2016:

PEOPLE v MCMILLAN, No. 151823; Court of Appeals No. 325783.

MICHIGAN CHARITABLE GAMING ASSOCIATION v STATE OF MICHIGAN, No. 151928; reported below: 310 Mich App 584.

PEOPLE v NEWMAN, No. 152025; Court of Appeals No. 327000.

PEOPLE v BALLY, No. 152232; Court of Appeals No. 320838.

PEOPLE OF THE CITY OF WESTLAND v MARTIN, No. 152268; Court of Appeals No. 317722.

JOHNSON v MARSH, No. 152654; Court of Appeals No. 322037.

PEOPLE v DEREK HENRY, No. 152676; Court of Appeals No. 321031.

PEOPLE v KRATKY, No. 152832; Court of Appeals No. 321754.

PEOPLE v STERLING STOKES, No. 152864; Court of Appeals No. 329281.

Summary Disposition April 1, 2016:

FIGURSKI v TRINITY HEALTH-MICHIGAN, No. 151428; Court of Appeals No. 318115. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Sections II., III., IV.D., and the first paragraph of Section VI. of the Court of Appeals judgment and we remand this case to the Court of Appeals for reconsideration in light of this Court's opinion in *Elher v Misra*, 499 Mich 11 (2016). We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered April 1, 2016:

BARUCH SLS, INC v TITTABAWASSEE TOWNSHIP, No. 152047; Court of Appeals No. 319953. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether *Wexford Med*

Group v City of Cadillac, 474 Mich 192 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis"; (2) if so, how "discriminatory basis" should be given proper meaning; (3) the extent to which the relationship between an institution's written policies and its actual distribution of charitable resources is relevant to that definition; and (4) whether, given the foregoing, the petitioner is entitled to a tax exemption. The parties should not submit mere restatements of their application papers.

PEOPLE v ROARK, No. 152562; Court of Appeals No. 316467. The parties shall file supplemental briefs within 42 days of the date of this order addressing the following issues: (1) whether the defendant was accurately advised of the direct consequences of his guilty plea, including lifetime electronic monitoring; (2) whether the defendant has demonstrated actual prejudice pursuant to MCR 6.508(D)(3)(b); and in particular, (3) whether the defendant must demonstrate that he would not have pleaded guilty if he had known about the lifetime electronic monitoring requirement. See, e.g., *United States v Timmreck*, 441 US 780, 783-784; 99 S Ct 2085; 60 L Ed 2d 634 (1979) (holding that a conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11); *Williams v Smith*, 591 F2d 169 (CA 2, 1979) (recognizing that the test applied by the Second Circuit for determining the constitutional validity of a state court guilty plea that was based on inaccurate sentencing information is whether the defendant was aware of actual sentencing possibilities, and, if not, whether accurate information would have made any difference in his decision to enter a plea). The parties should not submit mere restatements of their application papers.

PEOPLE v COMER, No. 152713; reported below: 312 Mich App 538. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d), i.e., whether MCL 750.520n requires that the defendant, who pled guilty to MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring, compare *People v Brantley*, 296 Mich App 546 (2012), with *People v King*, 297 Mich App 465 (2012); and (2) if so, whether the trial court was authorized to amend the defendant's judgment of sentence on the court's own initiative twenty months after the original sentencing, in the absence of a motion filed by any party. See MCR 6.429; MCR 6.435. The parties should not submit mere restatements of their application papers.

We further order the St. Clair Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 1, 2016:

FIGURSKI v TRINITY HEALTH-MICHIGAN, No. 151430; Court of Appeals No. 319086.

HALL v MIKO, No. 152217; Court of Appeals No. 322036.

MARKMAN, J. I would grant leave to appeal to consider defendants' argument that this Court should overrule *McCormick v Carrier*, 487 Mich 180 (2010), and reinstate *Kreiner v Fischer*, 471 Mich 109 (2004), which itself was overruled by *McCormick*. Defendants concede that plaintiffs satisfy the no-fault act's "serious impairment" threshold for tort liability as construed by *McCormick*, and plaintiffs concede that plaintiff Tracy Moore probably would not be able to satisfy the "serious impairment" threshold as construed by *Kreiner*. Therefore, this would seem to be an appropriate case to assess both *McCormick* and *Kreiner*, which as both parties recognize set very different thresholds for tort liability, and to determine which is most compatible with MCL 500.3135.

PEOPLE v MANCIEL, No. 152414; Court of Appeals No. 312804.

ZAHRA, J. (*dissenting*). I respectfully dissent. I believe the overwhelming record evidence supports the prosecution's application for leave to appeal. Despite repeated directions to the contrary, the trial judge, Judge James A. Callahan, continues to rely on orders in unrelated cases to render rulings entirely inconsistent with the record evidence. Judge Callahan apparently fails to appreciate when an order of this Court constitutes binding precedent. I would grant leave.

I. FACTS OF THE UNDERLYING CASE

Defendant first broached an alibi claim before jury selection by informing Judge Callahan that he "was somewhere else when this incident happened" and that "[t]his is the first dialogue I had with my attorney, so she didn't know about the alibi witnesses I have and the evidence I have." Defendant asked for an opportunity to present his witnesses and evidence so that he could receive a fair trial. Defense counsel, attorney Cena Colbert White, addressed Judge Callahan and stated that "[w]ith respect to the alibi notice that he's indicating to me, I received notice for the first time regarding an alibi at 10:06 this morning." White added that she had spoken to defendant at the jail and during court appearances multiple times. Judge Callahan expressed his belief in counsel's version of the events and the trial proceeded. A jury convicted defendant of unarmed robbery and first-degree home invasion, and he was sentenced as a fourth-offense habitual offender to 15 to 30 years' imprisonment for the home invasion conviction and 5 to 15 years' imprisonment for the unarmed robbery conviction.

Pursuant to an order issued by the Court of Appeals,[1] Judge Callahan held an evidentiary hearing on defendant's claim of ineffective assistance of counsel. White testified that she had visited defendant at the jail on May 16, July 2, July 12, and August 24, 2012, and that defendant was extremely involved in the development of his defense theory, which was misidentification, based on the intruder's wearing a mask. White denied that defendant provided information about potential alibi witnesses before trial. Indeed, she testified that one of defendant's alleged alibi witnesses, Jeanetta Harris, had retained White's services for defendant, but never told White that she was with defendant at the time of the crime. White testified that she first learned of a potential alibi defense on the first day of trial, at which time defendant told her that he was at his father's house when the crime was committed.

White also testified that during her July 2, 2012 visit with defendant, defendant told her that the complainant sold marijuana and that he kicked in the complainant's door to steal the complainant's drug proceeds. White also presented notes taken during that interview, which had been signed by defendant and corroborated her testimony.

Judge Callahan, despite having previously indicated on the record that he believed White's claim that defendant had first broached an alibi defense immediately before trial, and despite clear evidence that defendant had lied when claiming at that time "[t]his is the first dialogue I had with my attorney, so she didn't know about the alibi witnesses I have and the evidence I have," concluded that White should have somehow gleaned the availability of defendant's alibi witnesses. Judge Callahan also concluded that the alibi witnesses would likely have made a difference in the outcome of trial and ruled that defendant was entitled to a new trial.

The prosecution challenged this decision, moved to expand the record, and was eventually provided a second evidentiary hearing.[2] After this hearing, Judge Callahan indicated that he believed that his original decision to grant defendant a new trial was appropriate, but claimed that he was in a quandary regarding the effect of a purported confession by defendant to White. Judge Callahan indicated that he had

> found not only in this case, but in other cases, that once an attorney has been informed by his client . . . that he or she has committed the crime, that the defense attorney is professionally and ethically bound not to call forth alibi witnesses, knowing full well that those alibi witnesses, if the client is to be believed, would be testifying falsely, giving perjurious testimony.

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[1] *People v Manciel*, unpublished order of the Court of Appeals, entered July 3, 2013 (Docket No. 312804).

[2] See *People v Manciel*, unpublished order of the Court of Appeals, issued May 29, 2014 (Docket No. 312804).

Judge Callahan then stated that he was "in a dilemma in that regard . . . based upon previous rulings of the Court of Appeals and the Supreme Court of this State" that

> recently indicated that the Trial Court erred in finding the testimony of former defense trial counsel credible when during a *Ginther*[3] hearing, he stated that the client had admitted his guilt to him and therefore, he was ethically precluded from calling alibi witnesses during his client's trial. Should a defense lawyer call alibi witnesses if his client has admitted his guilt? Should the client's admission be considered at all in the defense lawyer's decision to call alibi witnesses?

Judge Callahan went on to conclude: "I guess [White] should have called the witnesses. Let the perjury begin."

The prosecution again challenged the ruling, but the Court of Appeals affirmed.[4] This Court, however, vacated the judgment of the Court of Appeals and remanded to the Court of Appeals, instructing it to remand the case to Judge Callahan for clarification of whether his ruling that defendant was entitled to a new trial was based on his determination that the defense witnesses were credible or whether he granted a new trial solely because he felt constrained to do so by this Court's orders in *unrelated* cases.[5]

On remand, Judge Callahan again referred to this Court's orders in unrelated cases. Judge Callahan again noted that White believed that defendant had admitted his culpability but explained that clients are not always honest when admitting to engaging in certain acts. Judge Callahan again claimed that he was

> in a dilemma in that regard, and therefore, based upon previous rulings of the Court of Appeals and the Supreme Court of this State, and based upon purported alibi witnesses being brought to the attention of defense counsel had made a decision that those alibi witnesses, because of the defendant admitting to the crime or giving a declaration against interest which could be construed as the same, had professionally chosen not to call those alibi witnesses because it would be a breach of professional ethics, for the defendant could not be in two places simultaneously.
>
> The Supreme Court and Court of Appeals have recently indicated that the Trial Court erred in finding the testimony of former defense trial counsel credible when during a *Ginther* hearing, he stated that the client had admitted his guilt to him and therefore, he was ethically precluded from calling alibi

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[3] *People v Ginther*, 390 Mich 436 (1973).

[4] *People v Manciel*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket No. 312804).

[5] *People v Manciel*, 497 Mich 1034 (2015).

> witnesses during his client's trial. Should a defense lawyer call alibi witnesses if his client has admitted his guilt? Should the client's admission be considered at all in the defense lawyer's decision to call alibi witnesses?

The prosecution sought to vacate Judge Callahan's order, but the Court of Appeals affirmed, entering an order noting that Judge Callahan had granted a new trial on the basis of the credibility of the witnesses.[6] Despite our clear caution not to rely on unrelated cases, Judge Callahan continued to improperly rely on orders in the unrelated cases to render a determination in the instant case that appears to be against the great weight of the evidence.

II. THE UNRELATED CASES

The unrelated cases that Judge Callahan repeatedly referred to are *People v Hunter*[7] and *People v Terrell*,[8] in which he had been reversed by this Court because we concluded "[t]he trial court clearly erred in finding that the defendant's trial attorney was credible." Needless to say, *Hunter* and *Terrell* are not binding precedent to the instant case or, more importantly, to future cases. Significantly, *Hunter* and *Terrell*, unlike the instant case, involved attorney Marvin Barnett, whose unprofessional and alleged criminal conduct recently resulted in his three-year suspension from the Attorney Discipline Board.

Hunter and *Terrell* are cases unrelated to each other. In each, the defendant was represented by Barnett. Each defendant was convicted of committing violent felonies. Each defendant moved for a new trial, claiming that he was denied the effective assistance of counsel. At each defendant's *Ginther* hearing, Barnett testified, without corroboration of any kind, that the defendant had confessed to him that he had committed the crime. Barnett claimed in each *Ginther* hearing that the confession ethically precluded him from presenting evidence inconsistent with the confession. Judge Callahan found Barnett's testimony credible. After thorough review of the lower court records in each case, this Court disagreed with Judge Callahan's credibility determinations with regard to Barnett. This Court remanded each case to the Court of Appeals for reconsideration of the defendants' ineffective-assistance claims without relying on Judge Callahan's credibility determination.

III. ANALYSIS

In *DeFrain v State Farm Mut Auto Ins Co*, this Court explained, "An order of this Court is binding precedent if it constitutes a final disposi-

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[6] *People v Manciel*, unpublished order of the Court of Appeals, entered August 14, 2015 (Docket No. 312804).

[7] *People v Hunter*, 493 Mich 1015 (2013).

[8] *People v Terrell*, 495 Mich 869 (2013).

tion of an application and contains a concise statement of the applicable facts and reasons for the decision."[9] "These requirements derive from article 6, § 6, of our 1963 Constitution . . . ."[10] The *Hunter* and *Terrell* orders contain no facts and no reasons for the decisions and, therefore, cannot be considered binding in cases other than *Hunter* and *Terrell*. Yet Judge Callahan extrapolated from these nonprecedential orders that he had previously committed error by concluding that

> once an attorney has been informed by his client, whether encouraged or spontaneously obtained from the client without elicitation, that he or she has committed the crime, that the defense attorney is professionally and ethically bound not to call forth alibi witnesses, knowing full well that those alibi witnesses, if the client is to be believed, would be testifying falsely, giving perjurious testimony.

The Court's orders in *Hunter* and *Terrell* made no such assertion. Nothing in the *Hunter* and *Terrell* orders raised any question in regard to an attorney's ethical obligation to call alibi witnesses if a defendant had admitted his guilt. Again, the orders only relate to the trial court's finding that now-suspended attorney Marvin Barnett's nearly identical uncorroborated testimony offered in the *Ginther* hearings in *Hunter* and *Terrell* was credible.

By relying on the unrelated orders and improperly extrapolating a rule from those cases, Judge Callahan failed to appreciate the significance of testimony from an officer of the court, White, whose testimony was far different from the testimony of Barnett in those unrelated cases. During the *Ginther* hearing in this case, White testified in great detail that defendant had admitted to her that he committed the offense. Her testimony was confirmed by notes taken during the interview, which defendant admittedly signed, though later claiming he was delusional. The evidence was also clear that defendant, a fourth-offense habitual offender, had lied when claiming that he had not met with White before trial. Significantly, Judge Callahan had acknowledged defendant's clear lack of credibility when denying his day-of-trial request to present alibi witnesses. Despite all indications to the contrary, Judge Callahan continued to improperly rely on this Court's orders in unrelated cases in which now-suspended attorney Marvin Barnett had acted as counsel.

Ginther hearings are fact intensive and must be evaluated on a case-by-case basis. Thus, it is difficult to understand why Judge Callahan believes he is constrained in this case by the orders in *Hunter* and *Terrell*. And while I acknowledge that factual findings made by a trial court are rarely disturbed on appeal, this Court's orders in *Hunter* and

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[9] *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369 (2012), citing *People v Crall*, 444 Mich 463, 464 n 8 (1993), and *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483 (2001).

[10] *DeFrain*, 491 Mich at 369.

Terrell were entirely justified. This point is made evident by the Michigan Attorney Discipline Board's notice of suspension, which documents that Barnett had committed a litany of misconduct in the practice of law.[11] Particularly relevant to our orders was that Barnett was found

[11] The notice provides:

> The hearing panel found that [Barnett] neglected a legal matter, in violation of MRPC 1.1(c); failed to seek the lawful objectives of his client through reasonably available means permitted by law, in violation of MRPC 1.2(a); failed to act with reasonable diligence in violation of MRPC 1.3; failed to communicate with his client in violation of MRPC 1.4(a) and (b); failed to keep client funds separate from his business funds, in violation MRPC 1.15(c); failed to deposit client funds into an IOLTA account, in violation of MRPC 1.15(g); requested a person other than his client to refrain from voluntarily giving relevant information to another party, in violation of MRPC 3.4(f); used means that have no substantial purpose other than to embarrass, delay, or burden a third person, or used methods of obtaining evidence that violated the legal rights of such a person, in violation of MRPC 4.4; and failed to treat with courtesy and respect all persons involved in the legal process, in violation of MRPC 6.5(a). The panel also found that respondent failed to provide information demanded by the Grievance Administrator, in violation of MRPC 8.1(a)(2); engaged in conduct which violated the Rules of Professional Conduct, contrary to MRPC 8.4(a); engaged in conduct which involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, contrary to MRPC 8.4(b); engaged in conduct prejudicial to the administration of justice, in violation of MCR 9.104(1); exposed the legal profession or the courts to obloquy, contempt, censure or reproach, in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(3); violated the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4); engaged in conduct in [sic] that violates a criminal law of a state and the United States, to wit, MCL 750.122(3) and (6), in violation of MCR 9.104(5); made knowing misrepresentations of facts or circumstances in his answer to the request for investigation, in violation of MCR 9.104(6); and made misrepresentations in his answer to the request for investigation, in violation of MCR 9.113(A). [Attorney Discipline Board, Notice of Suspension and Restitution for Marvin Barnett, issued October 28,

to have "engaged in conduct which involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, contrary to MRPC 8.4(b)[.]"[12] The hearing panel also found that Barnett had "engaged in conduct that is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(3)" and "engaged in conduct . . . that violates a criminal law of a state and the United States, to wit, MCL 750.122(3) and (6), in violation of MCR 9.104(5)," which generally relate to threats and intimidation of witnesses.[13]

Given Judge Callahan's continued improper reliance on our nonprecedential and unrelated orders and his failure to appreciate the individual merit of the instant case, I would grant the prosecution's application.

Application for Leave to Appeal Dismissed on Stipulation April 1, 2016:

PEOPLE v ALEMU, No. 152247; Court of Appeals No. 320560. Oral argument granted on application 498 Mich 929.

Summary Disposition April 6, 2016:

WADE v MCCADIE, No. 151196; Court of Appeals No. 317531. On March 9, 2016, the Court heard oral argument on the application for leave to appeal the January 29, 2015 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). The Court of Appeals erred by interpreting the term "medical record" in MCL 600.2912b(5) and MCL 600.2912d(3), which are sections of the Revised Judicature Act, by reference to the definition of "medical record" in a section of the Medical Records Access Act that begins with the limitation "[a]s used *in this act*." MCL 333.26263 (emphasis added). See *Woodard v Custer*, 476 Mich 545, 563 (2006). The Court of Appeals further erred by imposing an obligation not found in MCL 600.2912b(5) that required the defendants to "offer a timely explanation for why [documents not within the defendants' control] were no longer available." We therefore vacate those parts of the Court of Appeals judgment reaching these conclusions. However, in light of the fact that the Court of Appeals would have reached the same result had it correctly relied on the plain meaning of "medical record," it is not necessary to reverse the result reached by the Court of Appeals. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

2015 (Case Nos. 14-8-GA, 14-26-GA, and 14-53-GA), p 1, available at <http:// www.adbmich.org/covoe/notices/2015-10-08-14n-8.pdf#search=%22Barnett%22> (accessed March 30, 2016) [https://perma.cc/9ARW-Q2HX].]

[12] *Id*.

[13] *Id*.

PEOPLE v RAPHAEL CAMPBELL, No. 152301; Court of Appeals No. 320557. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion stating that the defendant was not entitled to raise a claim of ineffective assistance of appellate counsel. Because defendant's motion for a new trial was filed during his appeal by right, he was entitled to counsel during the proceeding and entitled to raise a claim of ineffective assistance of counsel on appeal. *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v BRYANT, No. 152443; Court of Appeals No. 328512. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the defendant's issue regarding the propriety of the Wayne Circuit Court's restitution award in light of *People v McKinley*, 496 Mich 410 (2014). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Granted April 6, 2016:

CLAM LAKE TOWNSHIP v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, No. 151800; Court of Appeals No. 325350. The parties shall include among the issues to be briefed: (1) whether the State Boundary Commission (SBC) has the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425); (2) if so, whether the SBC in this case properly determined that the appellant townships' Act 425 Agreement was invalid; and (3) whether, despite the language of MCL 117.9(6) and MCL 123.1012(3) (providing a two-year waiting period before resubmission of a petition for annexation), the doctrine of collateral estoppel applied to invalidate the SBC's 2014 approval of the appellee property owner's petition for annexation on the basis of the SBC's denial of the same property owner's petition in 2012.

We further order that this case be argued and submitted to the Court together with the case of *TeriDee LLC v Haring Charter Twp* (Docket No. 153008), at such future session of the Court as both cases are ready for submission. In light of the joint submission, the time allotted for oral argument shall be limited to fifteen minutes per side in each case. MCR 7.314(B)(1). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800) only and served on the parties in both cases.

TERIDEE LLC v HARING CHARTER TOWNSHIP, No. 153008; Court of Appeals No. 324022. The parties shall include among the issues to be briefed: (1) whether the defendant townships' Agreement pursuant to the

Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425), was void because certain provisions of the Agreement contracted away Haring Township's legislative zoning authority; (2) if so, whether the offending provisions of the defendant townships' Act 425 Agreement were severable; and (3) whether the challenged provisions of the Act 425 Agreement were authorized by Section 6(c) of Act 425, MCL 124.26(c).

The Michigan Townships Association and the Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

We further order that this case be argued and submitted to the Court together with the case of *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800), at such future session of the Court as both cases are ready for submission. In light of the joint submission, the time allotted for oral argument shall be limited to fifteen minutes per side in each case. MCR 7.314(B)(1). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800) only and served on the parties in both cases.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 6, 2016:

SIMPSON v PICKENS, No. 152036; reported below 311 Mich App 127. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether, in order to bring a wrongful-death action under MCL 600.2922 for the death of a fetus or embryo, a plaintiff must meet the affirmative-act requirement of MCL 600.2922a. See *Johnson v Pastoriza*, 491 Mich 417 (2012). The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

Leave to Appeal Denied April 6, 2016:

PEOPLE v HANSERD, No. 150761; Court of Appeals No. 323099.

CORL v HURON AND EASTERN RAILWAY, COMPANY, INC, No. 150970; Court of Appeals No. 319004. On March 10, 2016, the Court heard oral argument on the application for leave to appeal the December 23, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v RENNIE, No. 151764; Court of Appeals No. 319742.

FOREST HILL ENERGY-FOWLER FARMS, LLC v BENGAL TOWNSHIP, No. 152060; Court of Appeals No. 319134.

KUBACKI v TRAN, No. 152267; Court of Appeals No. 319821.

PEOPLE v LOUKAS, No. 152284; Court of Appeals No. 318572.

PEOPLE v WAYNE DAVIS, No. 152302; Court of Appeals No. 321762.

PEOPLE v KLINGENBERG, No. 152464; Court of Appeals No. 319534.

In re YARBROUGH, Nos. 153129 and 153130; Court of Appeals Nos. 326170 and 326171.

Summary Disposition April 8, 2016:

PEOPLE v ROBERT SMITH, No. 151663; Court of Appeals No. 316224. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to stay and the motion for guidance are denied. We do not retain jurisdiction.

HOLETON v CITY OF LIVONIA, No. 152413; Court of Appeals No. 321501. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part V of the judgment of the Court of Appeals, and we remand this case to that court. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court for further proceedings to determine whether the defendants were prejudiced by the plaintiffs' delay in bringing their action. At the conclusion of those proceedings, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then reconsider its decision that the plaintiffs' claims for injunctive and declaratory relief were barred by the equitable doctrine of laches. See *Lothian v City of Detroit*, 414 Mich 160, 168 (1982). We do not retain jurisdiction.

Superintending Control Denied April 8, 2016:

SINGH v BOARD OF LAW EXAMINERS, No. 153252.

Summary Disposition April 15, 2016:

PEOPLE v SIKORSKI, Nos. 152409 and 152442; Court of Appeals No. 320867. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment concluding that the defendant's conviction for first-degree criminal sexual conduct under MCL 750.520b(1)(d)(*ii*) violates the double jeopardy protections of the United States and Michigan Constitutions, and we remand this case to the Court of Appeals for reconsideration of whether this conviction was based on the same act of penetration as the defendant's conviction under MCL 750.520b(1)(c), given the manner in which the jury was instructed as to each count after the close of proofs. If, upon reconsideration, the Court of Appeals concludes that no double jeopardy violation occurred, it shall reach and resolve the defendant's challenge to whether the evidence was sufficient to sustain his conviction under MCL 750.520b(1)(d)(*ii*).

Leave to Appeal Denied April 15, 2016:

HARRELL v TITAN INSURANCE COMPANY, No. 151134; Court of Appeals No. 318744. On April 6, 2016, the Court heard oral argument on the application for leave to appeal the January 20, 2015 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

THOMAS v WHITE BIRCH LAKES RECREATION ASSOCIATION, No. 152367; Court of Appeals No. 322836.

THE VICTOR FIRM, PLLC v FROLING, No. 152885; Court of Appeals No. 327504.

ZAHRA, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted. Plaintiff law firm (Victor)[1] filed this collection action in the district court to collect $4,560 in attorney fees from its former clients, defendants William and Marilyn Froling. The Frolings had hired Victor to represent them in a federal lawsuit in the United States District Court for the Eastern District of Michigan. The litigation involved the Frolings' longstanding dispute with the city of Bloomfield Hills (City) regarding flooding of their property. Victor filed a federal lawsuit on the Frolings' behalf and successfully defended against a motion to dismiss the complaint. However, the federal court ordered the Frolings to file an amended complaint. Upon reviewing the amended complaint, the attorney representing the City, William Hampton, left a voicemail for Cindy Victor, requesting concurrence in a motion to strike ¶¶ 5 through 74 of the

[1] "Victor" here refers to both the Victor Firm, PLLC, and its managing member, Cindy Rhodes Victor.

amended complaint. When the City filed an answer to the amended complaint, it stated in answer to ¶¶ 5 through 74 of the complaint as follows:

> Inasmuch as purported factual allegations Paragraphs 5 through 74 inclusive set forth historical background prior to claims at issue in this Complaint, the parties agree no answer is required as to said paragraphs. Simultaneously herein, [the City] has sought concurrence of [the Frolings] in a Motion to Strike and in lieu of filing such a Motion, a Stipulation has been agreed to between the parties.

Victor denied having agreed to the stipulation, but the Frolings believed that Victor had "secretly stipulated" with Hampton in violation of a "Memorandum of Understanding" between Victor and the Frolings purporting to impose special conditions on Victor's representation. According to the Frolings, Victor accepted these special conditions and accepted a $20,000 retainer. William Froling states in his affidavit as follows:

> Prior to hiring Ms. Victor to perform legal services, I explained that she would be hired only on the condition that certain promises were made. First, Ms. Victor would have to agree that I would be an unusual client who would closely monitor the litigation and who must be informed of any and all litigation developments, including all communications with the opposing side. Second, I required Ms. Victor to consent to allowing me to decide legal strategy, including stipulations that might ordinarily in any other case be handled exclusively between attorneys. I explained to Ms. Victor some bad experiences that I had with other attorneys when I allowed them to exclusively dictate legal strategy. These prior bad experiences formed the basis for the requirement that Ms. Victor agree to allow me to control strategy, within legal and ethical boundaries.

At a hearing before the district court, the Frolings' attorney acknowledged that the memorandum had not been signed, but claimed that Victor had nevertheless agreed to its terms. Victor denied signing the memorandum and noted that the unsigned memorandum provides that

> [t]he following items listed below constitute this memorandum made between Greenstone Development, LLC (Client) and _____ (legal firm).

According to Victor, the memorandum was drafted for cases in which the client is a defendant, not a plaintiff as the Frolings were in the federal action. The memorandum purports to give the clients broad control over litigation strategy. In particular, ¶ 6a says that all documents must be signed by the clients. Moreover, ¶ 9 says that adjournments or delays of any kind requested by opposing counsel cannot be granted without the clients' approval. Cindy Victor claims that she informed William Froling

on numerous occasions while she was representing him that she would not do some of the things he requested. The district court granted summary disposition in favor of Victor and entered a judgment in its favor totaling $4,560, plus taxable costs of $318 and statutory interest.

The Frolings appealed in the circuit court. The circuit court reversed the district court, noting that the Frolings had "presented evidence that they retained control over the federal action consistent with a Memorandum of Understanding, the terms of which [Victor] agreed to abide." The circuit court also noted that the Frolings "submitted additional evidence that [Victor] had agreed to a stipulation in the federal action, without first consulting [the Frolings], that the City of Bloomfield Hills did not have to answer ¶¶ 5-74 of the amended complaint." The court concluded that the Frolings "obviously lost faith and confidence in [Victor]," which caused the Frolings to "incur additional expenses that they would have otherwise not incurred had [Victor] complied with the Memorandum of Understanding." On reconsideration, the circuit court affirmed its decision, noting that there was "a genuine issue of material fact as to whether the parties had agreed to the terms of the Memorandum of Understanding." Victor appealed in the Court of Appeals, but the panel denied leave to appeal for lack of merit in the grounds presented.[2]

I disagree with the panel's conclusion that Victor's claim lacks merit. There is no question that the parties had a contractual relationship. The district court entered summary disposition on March 3, 2014, in favor of Victor on the basis of invoices that the Frolings did not genuinely dispute, and the Frolings did not appeal that decision. At that point, the only remaining question was raised at the previous hearing held on February 10, 2014, which the district court began by indicating that it had

> seen written correspondence that--from [Victor] to [the Frolings] that states this Retainer Agreement, okay. Now, what I haven't seen though is this, the [Frolings] ha[ve] claimed that this representation was bound by a special condition of control to be vested in the [Frolings], and that was by agreement of the parties. Is—is there a writing that I've missed somewhere, is there some sort of writing that—that speaks to this special nature of--of the Retainer?

At this point counsel for the Frolings stated:

> There is. I just actually received this today. It's entitled "Memorandum of Understanding Between Client and Attorney," now this, like the letter, was not signed by both parties, but apparently this was reviewed with--by Mr. Froling, witnessed by a couple other family members or individuals in this company

[2] *Victor Firm PLLC v Froling*, unpublished order of the Court of Appeals, entered November 12, 2015 (Docket No. 327504).

> and Ms. Victor, and she agreed to the terms here, which really give him a great deal of control, or at least feedback before things were filed, before things were negotiated, things of that nature. Knowing that it was unusual, [Mr. Froling] wanted to put it in writing.

The district court, obviously frustrated at what it thought was "again . . . 11th hour stuff, . . . just as [the Frolings' counsel's] retention last time . . . was kind of a last minute deal to [sic] close to—to the hearing date so that the Court felt compelled to grant [Victor's] request for adjournment," again adjourned the matter but assessed $500 in costs against the Frolings.

At the next and final hearing held on March 3, 2014, counsel for Victor pointed out the obvious deficiencies in the memorandum, including that it was unsigned, was merely a sample document, and was simply not relevant to the instant case. In response, counsel for the Frolings claimed that "there's multiple witnesses to know whether I—they printed [it] out from their business office or not" and that Cindy Victor had been asked: " 'Do you understand it, do you agree to this?' And, she did. And, it's recorded, and it's witnessed."

The district court allowed continued discovery on the Frolings' recoupment claim, but the Frolings presented no additional evidence to support their claim that Victor agreed to the memorandum. No witnesses to the agreement were identified, and there is simply no basis to conclude that the memorandum supplemented the retainer agreement, particularly in regard to terms that Victor stated (and the district court agreed) no attorney would have agreed upon. In sum, Victor has presented a very strong argument that the memorandum should simply be disregarded as parol evidence.[3]

Further, even assuming that Victor orally assented to the terms of the memorandum, there is no evidence that Victor breached the agreement in the manner alleged by the Frolings. That is, there is no record evidence that Victor entered into a stipulation with the attorney representing the City (William Hampton) with regard to striking ¶¶ 5 through 74 of the amended complaint. Although Hampton filed an answer to the amended complaint in federal court stating that "[the City] has sought concurrence of [the Frolings] in a Motion to Strike [¶¶ 5 through 74] and in lieu of filing such a Motion, a Stipulation has been agreed to between the parties," no stipulation was entered by court order, and there is no

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[3] " ' "[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." ' " *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 166 (2006), quoting *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580 (1990).

evidence of an effective stipulation.[4] The circuit court initially indicated that summary disposition was not appropriate when a disputed issue of material fact turns on the credibility of an affiant or a deponent. The circuit court, on reconsideration, also relied on *People v Garland*[5] for the proposition that a court has no reason not to accept representations of counsel, who is bound by a duty of candor. The circuit court failed to appreciate that even assuming the truth of Hampton's statement, the stipulation was nonetheless not effective under the applicable court rules because it was not signed by the parties.[6] Because I believe that Victor's claim has merit, I would remand this case to the Court of Appeals for plenary consideration as on leave granted.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

GORSKI v AT&T MICHIGAN, No. 153441; Court of Appeals No. 329039.

Orders in Conformity With Mandates of the United States Supreme Court Entered April 25, 2016:

PEOPLE v CARP, No. 146478; opinion at 496 Mich 440. On order of the Court, in conformity with the mandate of the Supreme Court of the United States, we reverse the November 15, 2012 judgment of the Court of Appeals, we vacate the defendant's sentence for first-degree murder, and we remand this case to the St. Clair Circuit Court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CORTEZ DAVIS, No. 146819; opinion at 496 Mich 440. On order of the Court, in conformity with the mandate of the Supreme Court of the United States, we reverse the January 16, 2013 order of the Court of Appeals, we vacate the defendant's sentence for first-degree

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[4] Under the Federal Rules of Civil Procedure, a plaintiff may dismiss an action after the opposing party has filed an answer without a court order by filing "a stipulation of dismissal *signed by all parties* who have appeared." FR Civ P 41(a)(1)(A)(ii) (emphasis added). See also MCR 2.507(G) ("An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.").

[5] *People v Garland*, 286 Mich App 1, 8 (2009), citing *People v Dunbar*, 463 Mich 606, 617 n 13 (2001).

[6] FR Civ P 41(a)(1)(A)(ii).

murder, and we remand this case to the Wayne Circuit Court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Summary Disposition April 25, 2016:

PEOPLE v TARA SULLIVAN, No. 150471; Court of Appeals No. 315843. In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

WALTERS v FALIK, No. 151186; Court of Appeals No. 319016. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Elher v Misra*, 499 Mich 11 (2016).

ROSEMAN v CITY OF DETROIT, No. 151790; Court of Appeals No. 314650. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court for the court to consider whether it has subject matter jurisdiction to hear the plaintiffs' claims pursuant to MCL 418.131(1) and MCL 418.827(1).

Leave to Appeal Denied April 25, 2016:

PEOPLE v ERIC SULLIVAN, No. 150569; reported below: 309 Mich App 1.

BITTERMAN v BOLF, No. 151520; Court of Appeals No. 319663.

BERNSTEIN, J. (*dissenting*). Defendant, Cheryl Bolf, is the duly elected clerk of the village of Oakley in Saginaw County. Defendant's duties as clerk are set forth by statute in the General Law Village Act at MCL 64.5 to MCL 64.8a. One such duty is to keep minutes of village council proceedings. MCL 64.5(3). The Open Meetings Act (OMA), MCL 15.261 *et seq.*, also requires a public body holding an open meeting under the

OMA to keep minutes of the proceedings. MCL 15.269(1). This provision does not task a particular person with minutes-keeping. However, when a closed meeting is held under the OMA, the clerk of the public body holding the meeting is required to take and maintain meeting minutes. MCL 15.267(2). Defendant's duties do not render her a member of the village council; she does not vote on matters before it.

The Oakley Village Council's process for keeping and approving minutes for its regular monthly meetings was as follows. Defendant kept minutes during each council meeting in the form of notes. At the subsequent meeting, defendant would read the minutes of the previous meeting aloud without providing written copies to the council members. A discussion would ensue, and the council members would make any necessary amendments before either approving the minutes "as read" or "as amended." The approved minutes were then set into final form and retained by the village council.

On November 8, 2012, the village council held its regular meeting. Defendant recorded the minutes as usual. At some point, the village council retired into a closed session. The minutes as initially recorded by defendant do not indicate that anything happened after the closed meeting began, including whether the regular open meeting resumed after the closed session was adjourned. Defendant's initial minutes were read and approved at the subsequent meeting on December 10, 2012. After the December meeting ended, however, defendant added a few sentences to the end of the November minutes, describing what had happened after the closed meeting ended and the regular meeting was reopened. Defendant now explains that, at the close of the December meeting, she was notified of an inadvertent omission from the November minutes. She informed the president of the village council, who advised her to add the missing content to the November minutes. Defendant did so, believing this to be her duty as clerk.

Plaintiff, Sharon Bitterman, who is an Oakley resident, filed suit against defendant under MCL 15.273(1), which provides: "A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action." Plaintiff alleged that defendant, as the village clerk, was a "public official" under the OMA and that she had intentionally violated the act by altering approved meeting minutes. Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no material question of fact regarding whether defendant had violated the OMA because defendant had admitted altering the minutes. Defendant also moved for summary disposition under MCR 2.116(C)(10), arguing that a village clerk is not a public official under the OMA. The trial court heard arguments on these motions and issued a written decision, granting defendant's motion and denying plaintiff's. The trial court agreed with defendant's argument that she was not a public official suable under the OMA.

The Court of Appeals affirmed the trial court. *Bitterman v Bolf*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2015 (Docket No. 319663). Because the OMA itself provides no defini-

tion of "public official," the Court of Appeals relied on the interpretation of "public official" set forth in *People v Whitney*, 228 Mich App 230 (1998). *Id*. at 4. *Whitney* involved not MCL 15.273(1), but rather its criminal liability counterpart, MCL 15.272(1), which provides: "A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00." The primary question in *Whitney* was whether the defendants, city council members accused of holding unlawful closed meetings, had intentionally violated the OMA. The *Whitney* Court concluded that the crime of intentionally violating the OMA has three elements: "(1) the defendant is a member of a public body, (2) the defendant actually violated the OMA in some fashion, and (3) the defendant intended to violate the OMA." *Whitney*, 228 Mich App at 253. In this case, the Court of Appeals concluded that *Whitney* was binding, that being a "public official" under the OMA requires membership in the public body, and that defendant was therefore not a public official liable under MCL 15.273(1). *Bitterman*, unpub op at 4.

I disagree and would reverse the Court of Appeals' decision in this case. First, I disagree with the Court of Appeals that *Whitney* was binding law with regard to the definition of "public official." The Court of Appeals panel determined that the *Whitney* definition of "public official" was not dicta because one of the questions on appeal in that case was the meaning of the phrase "public official who intentionally violates this act." *Id*. But in fact, the only part of this phrase that was truly in question in *Whitney* was the intent element; whether the *Whitney* defendants were actually public officials was not at issue. The *Whitney* defendants were undisputedly public officials with duties under the OMA. Interpreting the meaning of "public official" was not necessary to decide *Whitney*, so the membership requirement articulated in that case is dicta. It is also worrisome that the *Whitney* Court imposed this membership requirement without any substantive discussion. Nothing in the plain language of the OMA would suggest that only a member of a public body could be liable for OMA violations. I am therefore concerned that the lower courts in this case may have wrongly assumed that this aspect of *Whitney* was binding, and I also believe that *Whitney* misconstrued the OMA to begin with.

I believe that the plain language approach to determining the meaning of "public official" proposed by plaintiff allows for the most reasonable interpretation of the OMA. When statutory terms are left undefined, we may resort to the dictionary to determine the plain meaning of the undefined term. *People v Morey*, 461 Mich 325, 330 (1999). A consultation of a lay dictionary reveals numerous definitions of "public" and "official," but no definition of "public official." There is, however, a definition of the similar phrase "public officer": "a person who has been legally elected or appointed to office and who exercises governmental functions." *Merriam-Webster's Collegiate Dictionary* (11th ed). This is remarkably akin to the *Black's Law* definition of "public official" proposed by plaintiff: "Someone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers." *Black's Law Dictionary* (10th ed), pp 1259, 1426. Under either of these definitions, defendant qualifies as a

public official—defendant is the duly elected clerk of the village of Oakley, and as clerk she has a number of duties related to the village's functioning as a governmental unit, including keeping a record of the village council's meetings.[1]

Defendant has raised concerns that adopting the broad dictionary definition of "public official" would subject any Tom, Dick, or Harry to civil liability under MCL 15.273, but these concerns are misplaced. Defendant fails to recognize the constraints that the remainder of that statute imposes—personal liability is limited to "[a] public official *who intentionally violates* [*the OMA*] . . . ." MCL 15.273(1) (emphasis added). In order to violate the OMA, a person must have a duty under it. See *Black's Law Dictionary* (10th ed) ("**1.** An infraction or breach of the law; a transgression. . . . **2.** The act of breaking or dishonoring the law; the contravention of a right or duty.") (defining "violation"). A public official would not need to fear personal liability under MCL 15.273(1) unless she or he had a duty under the OMA; otherwise, there could be no violation of the OMA. Furthermore, that violation must be intentional. Both of these constraints vitiate the concerns defendant raises about adopting a broad definition of "public official."

For these reasons, I would reverse the judgment of the Court of Appeals and conclude that defendant was a public official within the meaning of the OMA.

MARKMAN, J., joined the statement of BERNSTEIN, J.

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[1] Alternatively, the same result is reached by application of the five-part test this Court articulated in *People v Freedland*, 308 Mich 449 (1944). There we held "that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature": (1) the office "must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature"; (2) the office "must possess a delegation of a portion of the sovereign power of government"; (3) the office's powers "must be defined . . . by the legislature"; (4) the office's duties "must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body"; and (5) the office must have "permanency and continuity . . . ." *Id*. at 457-458 (quotation marks and citation omitted). Defendant qualifies as a "public official" under this test because (1) the office of village clerk is created by the Legislature, MCL 62.1(1); (2) it holds public power, MCL 64.5 to MCL 64.8; (3) its powers are legislatively defined, *id*.; (4) its duties are performed independently or under guidance of superior offices created by the Legislature, MCL 64.5 to MCL 64.8a; and (5) it has permanency through regular elections, MCL 62.1(1), or through appointment by the village council, MCL 62.1(3). Thus, viewing the term "public official" in MCL 15.273(1) under its plain meaning or under *Freedland*'s technical definition, defendant is a public official.

PEOPLE v DORSEY, No. 151601; Court of Appeals No. 323688.

PEOPLE v PARK, No. 151617; Court of Appeals No. 323869.

PRANSKY v FALCON GROUP, INC, Nos. 152077 and 152078; reported below: 311 Mich App 164.

PEOPLE v LEO EVANS, No. 152441; Court of Appeals No. 320836.

PEOPLE v BUEKER-DECAMP, No. 153047; Court of Appeals No. 328754.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 29, 2016:

FOWLER v MENARD, INC, No. 152519; Court of Appeals No. 310890. The parties shall file supplemental briefs within 42 days of the date of this order including, among the issues to be briefed, whether the crosswalk installed by the defendant had a special aspect that could create liability for even an open and obvious hazard, and whether such a special aspect can exist if the condition is not unreasonably dangerous. See *Hoffner v Lanctoe*, 492 Mich 450, 455 (2012); *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517 (2001). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied April 29, 2016:

In re HAYNES, No. 153401; Court of Appeals No. 327820.

Summary Disposition May 2, 2016:

PEOPLE v RICHARD SIMMONS, No. 146030; Court of Appeals No. 303201. By order of April 28, 2015, the application for leave to appeal the September 13, 2012 judgment of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Lake Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, *supra; Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v WINES, No. 147013; Court of Appeals No. 312441. By order of April 28, 2015, the application for leave to appeal the January 25, 2013 order of the Court of Appeals was held in abeyance pending the decision

in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US __; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Kent Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana, supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MARK DAWSON, No. 149699; Court of Appeals No. 320166. By order of April 28, 2015, the application for leave to appeal the June 27, 2014 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Shiawassee Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*, and *Miller v Alabama,* 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v JAMES WASHINGTON, No. 149791; Court of Appeals No. 319527. By order of April 28, 2015, the application for leave to appeal the June 3, 2014 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Saginaw Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, *supra*; *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v CUTTER, No. 150859; Court of Appeals No. 317355. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the St. Clair Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint

on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DANIEL JONES, No. 150949; Court of Appeals No. 323819. By order of December 22, 2015, the application for leave to appeal the December 4, 2014 order of the Court of Appeals was held in abeyance pending the decision in *Montgomery v Louisiana*, cert gtd 575 US ___; 135 S Ct 1546; 191 L Ed 2d 635 (2015). On order of the Court, the case having been decided on January 25, 2016, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery*, *supra*, and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v MARIO SMITH, No. 150980; Court of Appeals No. 323371. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. The motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), is denied. We do not retain jurisdiction.

PEOPLE v JORDAN, No. 151037; Court of Appeals No. 323993. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). We note that the Court of Appeals erred in dismissing the defendant's delayed application for leave to appeal under MCR 6.502(G) because this was the defendant's first motion for relief from judgment since August 1, 1995. We do not retain jurisdiction.

PEOPLE v LONNELL HAYWOOD, No. 151476; Court of Appeals No. 325431. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied, because

we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ARMSTRONG, No. 151548; Court of Appeals No. 325057. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v MARVIN LEWIS, No. 151751; Court of Appeals No. 325773. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). We do not retain jurisdiction.

PEOPLE v KIMBERLY SIMMONS, No. 151869; Court of Appeals No. 325379. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

PEOPLE v CHRISTOPHER JOHNSON, Nos. 152237, 152238, and 152239; Court of Appeals Nos. 316314, 316983, and 320014. On order of the Court, the application for leave to appeal the July 7, 2015 judgment of the Court of Appeals is considered. With regard to Court of Appeals Docket Nos. 316314 and 316983, the application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. With regard to Court of Appeals Docket No. 320014, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In

all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V ALICE-KNIGHT, No. 152336; Court of Appeals No. 320835. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V PETROSKY, No. 152412; Court of Appeals No. 327674. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V DEBRUYN, No. 152529; Court of Appeals No. 328363. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

NOLL V RITZER, No. 152759; Court of Appeals No. 328131. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v SCHEFF, No. 152936; Court of Appeals No. 329553. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the St. Clair Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentences absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v WARREN CLARK, No. 152960; Court of Appeals No. 329515. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentences absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MALONE, No. 153174; Court of Appeals No. 329989. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied May 2, 2016:

PEOPLE v ROBY, No. 151545; Court of Appeals No. 324411.

PEOPLE v GLENN, No. 151636; Court of Appeals No. 324784.

PEOPLE v YARBOURGH, No. 151702; Court of Appeals No. 326188.

PEOPLE v WALTER WILLIAMS, No. 151744; Court of Appeals No. 325848.

PEOPLE v MYKOLAITIS, No. 151754; Court of Appeals No. 326599.

HILL v ESSENTIAL SUPPORT SERVICES FOR INDEPENDENT EXISTENCE LLC, No. 151755; Court of Appeals No. 320884.

PEOPLE v PATTERSON, No. 151787; Court of Appeals No. 325995.

PEOPLE v MARCUS MANNING, No. 151807; Court of Appeals No. 325671.

PEOPLE v ALVAREZ, No. 151812; Court of Appeals No. 319988.

PEOPLE v STANLEY WHITE, No. 151818; Court of Appeals No. 326068.

PEOPLE v JOHNNY WILLIAMS, No. 151822; Court of Appeals No. 324906.

PEOPLE v MONTEZ MOORE, No. 151832; Court of Appeals No. 324550.

PEOPLE v WINSTON, No. 151839; Court of Appeals No. 326483.

PEOPLE v FAISON, No. 151848; Court of Appeals No. 313857.

PEOPLE v ELLEDGE, No. 151867; Court of Appeals No. 326877.

PEOPLE v O'DONNELL, No. 151872; Court of Appeals No. 326671.

PEOPLE v GRESS, No. 151916; Court of Appeals No. 327191.

PEOPLE v BRABO, No. 151922; Court of Appeals No. 320135.

PEOPLE v GRIMA, No. 151932; Court of Appeals No. 327675.

PEOPLE v WALTER NEAL, No. 151934; Court of Appeals No. 327141.

PEOPLE v CERNEY, No. 151940; Court of Appeals No. 327097.

PEOPLE v KIKUCHI, No. 151946; Court of Appeals No. 326263.

PEOPLE v MOSHER, No. 151971; Court of Appeals No. 320444.

PEOPLE v FERRIS WILLIAMS, No. 152022; Court of Appeals No. 326370.

PEOPLE v JAROY DAVIS, No. 152030; Court of Appeals No. 325759.

PEOPLE v DONNAL, No. 152041; Court of Appeals No. 326708.

PEOPLE v PHELPS, No. 152045; Court of Appeals No. 327367.

MILLS v ST JOHN HEALTH, No. 152269; Court of Appeals No. 319282.

HERSCHFUS v SAKWA, No. 152310; Court of Appeals No. 322003.

PEOPLE v WYNGARDEN, No. 152313; Court of Appeals No. 321736.

PEOPLE v ANDRE THOMAS, No. 152329; Court of Appeals No. 320329.

PEOPLE v BOLTON, No. 152330; Court of Appeals No. 321842.

PEOPLE v BALLARD, No. 152344; Court of Appeals No. 328174.

PEOPLE v CHAMPION, No. 152366; Court of Appeals No. 327918.

In re MAHONEY TRUST, No. 152380; Court of Appeals No. 320074.

In re MAHONEY TRUST, No. 152391; Court of Appeals No. 320074.

PEOPLE v DANISKA, Nos. 152399 and 152400; Court of Appeals Nos. 318931 and 318934.

PEOPLE v PLOTTS, No. 152402; Court of Appeals No. 315223.

PEOPLE v WALLACE, No. 152408; Court of Appeals No. 321455.

PEOPLE v MCCRUMB, No. 152424; Court of Appeals No. 327586.

KNOX-PIPES v GENESEE INTERMEDIATE SCHOOL DISTRICT, No. 152427; Court of Appeals No. 322295.

PEOPLE v CHAPMAN, No. 152456; Court of Appeals No. 327152.

PEOPLE v ALGRA, No. 152458; Court of Appeals No. 321374.

PEOPLE v MILNER, No. 152474; Court of Appeals No. 328232.

CALVERT v GLEASON, Nos. 152478 and 152479; Court of Appeals Nos. 320847 and 321024.

PEOPLE v BRUCE BUTLER, No. 152480; Court of Appeals No. 319548.

BUREAU OF HEALTH SERVICES v MARROGHI-JABRO, No. 152481; Court of Appeals No. 327146.

PEOPLE v WATKINS, No. 152498; Court of Appeals No. 321591.

PEOPLE v SHIELDS, No. 152502; Court of Appeals No. 322293.

HIER v DOUGLAS J MANAGEMENT, LLC, No. 152504; Court of Appeals No. 321792.

PEOPLE v PEDERSEN, No. 152527; Court of Appeals No. 321605.

PEOPLE v STEWART MARTIN, No. 152531; Court of Appeals No. 328417.

PEOPLE v STEWART MARTIN, No. 152533; Court of Appeals No. 328444.

PEOPLE v JOSEPH FORD, No. 152537; Court of Appeals No. 322456.

PEOPLE v ISABELL-TAYLOR, No. 152546; Court of Appeals No. 327084.

PEOPLE v JESSIE GREEN, No. 152552; Court of Appeals No. 321519.

PEOPLE v WOODIE LEWIS, No. 152559; Court of Appeals No. 321120.

PEOPLE v MCKINNEY, No. 152563; Court of Appeals No. 321843.

SHEPARD v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 152574; Court of Appeals No. 327857.

PEOPLE v MERCURIO, No. 152575; Court of Appeals No. 328312.

PEOPLE v RICE, No. 152579; Court of Appeals No. 320866.

PEOPLE v TISDALE, No. 152580; Court of Appeals No. 327135.

PEOPLE v GOWING, No. 152584; Court of Appeals No. 328144.

PEOPLE v MOHAMED, No. 152596; Court of Appeals No. 328676.

PEOPLE v STARKS, No. 152652; Court of Appeals No. 321354.

PEOPLE v TIMOTHY SANDERS, No. 152656; Court of Appeals No. 314765.

ELANDT v SALLIE MAE HOME LOANS, INC, No. 152657; Court of Appeals No. 322299.

PEOPLE v SEAN CAMPBELL, No. 152667; Court of Appeals No. 321917.

PEOPLE v ANTWAN WILLIAMS, No. 152668; Court of Appeals No. 322022.

PEOPLE v MONTE ARNOLD, No. 152677; Court of Appeals No. 322146.

PEOPLE v GIBBS, No. 152679; Court of Appeals No. 328286.

PEOPLE v MYRON WILLIAMS, No. 152682; Court of Appeals No. 321582.

HURON CITY COMPANY v PARCELLS, No. 152686; Court of Appeals No. 327988.

PEOPLE v JONATHAN MAY, No. 152687; Court of Appeals No. 320635.

PEOPLE v KNIGHT, No. 152692; Court of Appeals No. 320631.

PEOPLE v LIMON, No. 152693; Court of Appeals No. 328701.

PEOPLE v PENNEBAKER, No. 152694; Court of Appeals No. 322117.

FELDKAMP v DEPARTMENT OF TREASURY, No. 152697; Court of Appeals No. 321735.

PEOPLE v BERGMAN, No. 152698; reported below: 312 Mich App 471.

MORRIS v DELVIN, No. 152705; Court of Appeals No. 328673.

PEOPLE v LAYE, No. 152710; Court of Appeals No. 322428.

TAIZHOU GOLDEN SUN ARTS & CRAFTS CO, LTD v COLORBÖK, LLC, No. 152712; Court of Appeals No. 320129.

PEOPLE v TENISHA JACKSON, No. 152722; Court of Appeals No. 328941.

PEOPLE v LAMARR ROBINSON, No. 152728; Court of Appeals No. 321841.

PEOPLE v LANG, No. 152729; Court of Appeals No. 328831.

PEOPLE v DESMOND CLARK, No. 152732; Court of Appeals No. 329049.

PEOPLE v CRYSTAL WILLIAMS, No. 152739; Court of Appeals No. 322606.

OLIVARES v ANN ARBOR HOUSING COMMISSION, No. 152744; Court of Appeals No. 322232.

PEOPLE v BRIAN WHITE, No. 152748; Court of Appeals No. 320696.

PEOPLE v CUELLAR, No. 152751; Court of Appeals No. 319872.

PEOPLE v CHARLES JACKSON, No. 152760; Court of Appeals No. 328779.

MORTON v THUMB CORRECTIONAL FACILITY WARDEN, No. 152761; Court of Appeals No. 327144.

PEOPLE v KEVIN JACKSON, No. 152769; reported below: 313 Mich App 409.

PEOPLE v CHASE, No. 152773; Court of Appeals No. 322417.

PEOPLE v AARON POWELL, No. 152775; Court of Appeals No. 329295.

PEOPLE v GILLIARD, No. 152776; Court of Appeals No. 329489.

PEOPLE v FINKLEY, No. 152780; Court of Appeals No. 323686.

BACOW v MASTER BEAT, INC, No. 152786; Court of Appeals No. 320323.

PEOPLE v MCCRAY, No. 152800; Court of Appeals No. 321344.

PEOPLE v LUMBARD, No. 152803; Court of Appeals No. 329178.

WINDRUSH, INC v VANPOPERING, No. 152812; Court of Appeals No. 315958.

PEOPLE v OUTTOEE, No. 152815; Court of Appeals No. 322719.

PEOPLE v HEWITT, No. 152824; Court of Appeals No. 322039.

PEOPLE v EGGLESTON, No. 152825; Court of Appeals No. 322710.

PEOPLE v WATKINS, No. 152833; Court of Appeals No. 321772.

PEOPLE v BEACH, No. 152853; Court of Appeals No. 329126.

PEOPLE v MCKNIGHT, No. 152860; Court of Appeals No. 321864.

PEOPLE v EDWARD MORRIS, No. 152866; Court of Appeals No. 329274.

PEOPLE v LAWSON, No. 152880; Court of Appeals No. 329130.

PEOPLE v TYUS, No. 152888; Court of Appeals No. 329536.

HARVEY-BEY v CENTRAL MICHIGAN CORRECTIONAL FACILITY WARDEN, No. 152892; Court of Appeals No. 328904.

PEOPLE v BRUCE PARKER, No. 152894; Court of Appeals No. 329436.

PEOPLE v MADDEN, No. 152902; Court of Appeals No. 329438.

POWELL MOVING AND STORAGE, INC v DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT, UNEMPLOYMENT INSURANCE AGENCY, No. 152912; Court of Appeals No. 327449.

US BANK NATIONAL ASSOCIATION v BELFORD, No. 152913; Court of Appeals No. 328445.

PEOPLE v RONALD WILSON, No. 152922; Court of Appeals No. 322074.

PEOPLE v JAMES REEVES, No. 152925; Court of Appeals No. 320218.

PEOPLE v REDA, No. 152951; Court of Appeals No. 322143.

PEOPLE v HARRY JOHNSON, No. 152980; Court of Appeals No. 329547.

GRIEVANCE ADMINISTRATOR v BESS, No. 153015.

PEOPLE v GARNER WOOD, No. 153057; Court of Appeals No. 329237.

PUNG v BLUE CROSS BLUE SHIELD, No. 153182; Court of Appeals No. 327793.

PEOPLE v NELSON, No. 153217; Court of Appeals No. 323685.

CITY OF DETROIT v PLYMOUTH CHARTER TOWNSHIP, No. 153221; Court of Appeals No. 327843.

Superintending Control Denied May 2, 2016:

DANY v BOARD OF LAW EXAMINERS, No. 152483.

Reconsideration Denied May 2, 2016:

PEOPLE v DENGEL, No. 152122; Court of Appeals No. 319940. Leave to appeal denied at 499 Mich 857.

PEOPLE v KANE, No. 151661; Court of Appeals No. 318237. Leave to appeal denied at 499 Mich 855.

CADLE COMPANY v ROBINSON, No. 151871; Court of Appeals No. 324863. Leave to appeal denied at 499 Mich 856.

NOTTINGHAM VILLAGE CONDOMINIUM ASSOCIATION v PENSOM, No. 151874; Court of Appeals No. 319552. Summary disposition at 499 Mich 852.

STRICKLAND v SECRETARY OF STATE, No. 152240; Court of Appeals No. 327466 . Leave to appeal denied at 498 Mich 952.

Leave to Appeal Denied May 6, 2016:

HARDY v LAURELS OF CARSON CITY, LLC, No. 150882; Court of Appeals No. 317406. On April 7, 2016, the Court heard oral argument on the application for leave to appeal the December 11, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

ROBERTS v SALMI, No. 150919; Court of Appeals No. 316068. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of September 16, 2015. The application for leave to appeal the December 18, 2014 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

PEOPLE v GRIFFIS, No. 151793; Court of Appeals No. 320033.

WILSON v DEAN, No. 152725; Court of Appeals No. 320417.

MARKMAN, J. (*dissenting*). At issue in this medical malpractice case is the sufficiency of plaintiff's affidavit of merit (AOM). Luella Ehrlinger underwent colorectal surgery in July 2009. Defendant Phillip A. Dean, who is board-certified in both colorectal and general surgery, performed the surgery as well as a second one later in the same month. Thereafter, Ehrlinger's health deteriorated, and on August 4, 2009, she went into cardiopulmonary arrest, dying approximately one month later.

Sherri Wilson, as the personal representative of Ehrlinger's estate, filed the instant wrongful-death action against Dean and others, alleging that Dean had committed malpractice during the two surgeries and in the postoperative period. Along with the complaint, plaintiff filed the required AOM, which was signed by an affiant who was board-certified

only in general surgery. Defendants moved for summary disposition, arguing that the AOM did not comply with MCL 600.2912d because the affiant was not also board-certified in colorectal surgery. In response, plaintiff moved to amend the AOM by having it signed by a new doctor who was board-certified in both specialties and additionally moved to amend the complaint by striking all paragraphs relating to malpractice during the two surgeries.

The trial court denied defendants' motion and granted plaintiff leave to amend the complaint, after which the Court of Appeals denied leave to appeal. This Court, however, remanded for consideration as on leave granted. *Wilson v Dean*, 497 Mich 950 (2015). On remand, the Court of Appeals held that given the limited nature of plaintiff's remaining claims, pertaining only to the postoperative period, plaintiff's AOM was sufficient because the most relevant medical specialty at issue during that period was general, and not colorectal, surgery. *In re Ehrlinger Estate*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2015 (Docket No. 320417), p 5.

The first issue is whether plaintiff's AOM was sufficient under MCL 600.2912d and MCL 600.2169 even though the initial affiant was board-certified only in general surgery. MCL 600.2912d(1) requires plaintiff's attorney to file an AOM "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." MCL 600.2169(1)(a) states that "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." In *Woodard v Custer*, 476 Mich 545, 560 (2006), we observed that MCL 600.2169 "only requires the plaintiff's expert to match . . . the one most relevant standard of practice or care . . . , and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." To determine whether a plaintiff's attorney had a reasonable belief under MCL 600.2912d(1) that the expert who signed the AOM meets the requirements of MCL 600.2169, courts must consider the information available at the time the AOM was *prepared*. *Grossman v Brown*, 470 Mich 593, 599-600 (2004).

The Court of Appeals failed to address *Grossman*, which could well have altered the result. Defendants present a reasonable argument that the relevant specialty at the time the AOM was prepared was colorectal, not general, surgery—the injuries alleged *all* seemed to flow from the colorectal surgeries, the complaint alleged malpractice for actions taken during these surgeries, and plaintiff's attorney knew or should have known of Dean's board certifications. If defendants prevail in this regard, plaintiff's AOM would be insufficient for failing to comply with MCL 600.2912d(1) because it would have been unreasonable to believe that general surgery was "the one most relevant standard of practice or care . . . ." *Woodard*, 476 Mich at 560.

The second issue is whether plaintiff may remedy the deficiencies of the AOM by amending it or the complaint. Defendants again present a reasonable argument against permitting plaintiff to retroactively satisfy AOM requirements by any such amendments. Regarding the

amendment of the AOM—allowing a new *affiant* to sign the old *affidavit*—defendants contend that this constitutes not an amendment of the AOM, but the introduction of an entirely new AOM. That is, a demarcation exists between valid and invalid amendments, and amendments that fundamentally alter the nature of the original AOM, as might the substitution of an altogether new affiant, conceivably would fall on the invalid side of this demarcation. Further, plaintiff's amendment of the complaint to limit the malpractice allegations to the postoperative period might also be seen as an attempt to circumvent the AOM requirements. If a party may always amend the complaint itself to cure a deficient AOM, then the AOM requirements would have increasingly little substantive force. A party could include a deficient AOM with the complaint but nonetheless proceed with the case as long as the complaint was later amended to fit the AOM.

I would remand this case to the Court of Appeals to consider both of these issues. Each raises the common concern that a defendant will be presented with one manner of case when the AOM is filed, but later be required to defend a different manner of case after the complaint or the AOM has been amended. Here, for instance, it may be that defendants were initially presented with, and prepared for, a case focusing on the intricacies of colorectal surgery, but as a result of amendment have had the case transformed into one focused on general medical practices during the postoperative period. Yet, the AOM is intended to "certify merit at the *outset* of the case . . . ." *Ligons v Crittenton Hosp*, 490 Mich 61, 84 (2011) (emphasis added). When, contrary to *Grossman*, the AOM's merits are not judged at the time it was prepared, but only after amendments have retroactively cured its deficiencies, merit has *not* been certified at the *outset*, and a defendant may face a case that was not certified as meritorious when the complaint and AOM were filed. In light of these concerns, I respectfully dissent and would remand for further consideration by the Court of Appeals.

PEOPLE v CLAYTON, No. 153063; Court of Appeals No. 329878.

In re HALEY/HOLTON, No. 153528; Court of Appeals No. 328239.

Summary Disposition May 18, 2016:

PEOPLE v SWAIN, No. 150994; Court of Appeals No. 314564. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the February 5, 2015 judgment of the Court of Appeals and we remand this case to the Calhoun Circuit Court for proceedings consistent with its judgment ordering a new trial. The Court of Appeals erred in applying *People v Cress*, 468 Mich 678 (2003), to an analysis of a successive motion filed pursuant to MCR 6.502(G)(2). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test. The Court of Appeals erred in failing to give proper deference to the specific findings of the trial court that the defendant was entitled to a new trial. The defendant provided "a claim of new

evidence that was not discovered before the first" motion for relief from judgment, MCR 6.502(G)(2), and we conclude that the trial court did not abuse its discretion in ordering a new trial on the facts of this case. In light of this disposition, we decline to address the other issues presented in our order granting leave to appeal. We do not retain jurisdiction.

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE & FIRE RETIREE PREFUNDED GROUP HEALTH & INSURANCE TRUST v CITY OF PONTIAC, No. 151717; reported below: 309 Mich App 590.

On April 6, 2016, the Court heard oral argument on the application for leave to appeal the March 17, 2015 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). The Court of Appeals erred in its reading of Executive Order 225 (EO 225). Contrary to the Court of Appeals conclusion, EO 225 by its plain language expresses the intent of the emergency manager to extinguish the defendant's 2011-2012 fiscal year contribution. Although that contribution accrued on June 30, 2012, the defendant had not yet paid the obligation when EO 225 went into effect. EO 225 clearly states that, as of August 1, 2012, the defendant no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both. Accordingly, the Court of Appeals erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution. Nonetheless, although the Court of Appeals determined that the emergency manager could retroactively extinguish the 2011-2012 fiscal year contribution through his authority under 2011 PA 14, it did not specifically address whether EO 225 was a permissible retroactive modification of the plaintiff's accrued right to the contribution. See *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014). We therefore reverse that part of the Court of Appeals judgment which interprets EO 225, vacate that part of the Court of Appeals judgment which discusses the plaintiff's breach of contract claim, and remand this case to the Court of Appeals for it to consider: (1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225; (2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution. We do not retain jurisdiction.

PEOPLE v URIBE, No. 151899; reported below: 310 Mich App 467. On March 10, 2016, the Court heard oral argument on the application for leave to appeal the May 12, 2015 judgment of the Court of Appeals. The application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. The Court of Appeals analysis of whether the Eaton Circuit

Court reversibly erred by excluding the proposed MCL 768.27a evidence under MRE 403 is flawed in several central respects. Most notably, the Court of Appeals failed to duly acknowledge and consider the following legal principles, which this Court articulated in *People v Watkins*, 491 Mich 450 (2012): (1) the trial court's evidentiary ruling is "review[ed] for an abuse of discretion," *id*. at 467; (2) while MCL 768.27a prevails over MRE 404(b) as to evidence that falls within the statute's scope, the statute does not mandate the admission of all such evidence, but rather "the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence," including MRE 403 and the "other ordinary rules of evidence, such as those pertaining to hearsay and privilege," *id*. at 484-485; and (3) there are "several considerations" that may properly inform a court's decision to exclude such evidence under MRE 403, including but not limited to "the dissimilarity between the other acts and the charged crime" and "the lack of reliability of the evidence supporting the occurrence of the other acts," *id*. at 487-488.

While we vacate the Court of Appeals judgment in full, we nonetheless reach the same result: we conclude that the proposed testimony falls within the scope of MCL 768.27a and that the trial court's exclusion of that evidence, when properly evaluated under MRE 403 and *Watkins*, amounted to an abuse of discretion warranting reversal. In ruling the proposed testimony inadmissible under MRE 403, the trial court, citing the illustrative list of "considerations" in *Watkins*, expressed concern regarding apparent inconsistencies between the proposed testimony and prior statements made by the witness, and certain dissimilarities between the other act and the charged offenses. The trial court, however, failed to explain—and this Court, on review of the record, fails to see—how or why these concerns were sufficient in this case to render the "probative value [of the proposed testimony] . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," as required for exclusion under MRE 403. *Id*. at 481. The list of "considerations" in *Watkins* provides a tool to facilitate, not a standard to supplant, this proper MRE 403 analysis, and it remains the court's "responsibility" to carry out such an analysis in determining whether to exclude MCL 768.27a evidence under that rule. See *id*. at 489-490. The trial court misconstrued *Watkins* and neglected this fundamental responsibility in its evidentiary analysis; as a result of these legal errors, the court abused its discretion by excluding the proposed testimony under MRE 403. Accordingly, we reverse the trial court's ruling to that effect, and we remand this case to the Eaton Circuit Court for further proceedings not inconsistent with this order.

Leave to Appeal Denied May 20, 2016:

In re COPE/HECT, Nos. 153511 and 153512; Court of Appeals Nos. 328536 and 328537.

Application for Leave to Appeal Dismissed Following Oral Argument May 20, 2016:

PEOPLE v ABREGO, No. 152111; Court of Appeals No. 320973. On April 6, 2016, the Court heard oral argument on the application for leave to appeal the June 11, 2015 judgment of the Court of Appeals. On order of the Court, the motion for immediate consideration and the defendant's motion to dismiss the application for leave to appeal are considered, and they are granted. We vacate that part of the Court of Appeals judgment remanding the case to the Ionia Circuit Court for resentencing.

Summary Disposition May 24, 2016:

PEOPLE v CHARLES LEWIS, No. 148425; Court of Appeals No. 315520. On order of the Court, in conformity with the mandate of the Supreme Court of the United States, the application for leave to appeal the August 29, 2013 order of the Court of Appeals is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, we vacate the defendant's sentence for first-degree murder, and we remand this case to the Wayne Circuit Court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama,* 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v VARNADO, No. 151897; Court of Appeals No. 326896. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's April 14, 2015 delayed application for leave to appeal under the standard applicable to direct appeals. The defendant's former appellate attorney failed to timely file in the trial court a motion to withdraw as counsel and failed to file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in MCR 7.205(G)(3). Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1209; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). The motion to remand to the trial court is denied. We do not retain jurisdiction.

PEOPLE v KNUCKLES, No. 152027; Court of Appeals No. 326758. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). We do not retain jurisdiction.

PEOPLE v ATWOOD, No. 152354; Court of Appeals No. 327566. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we grant the

motions to remand and appoint counsel and vacate the orders of the Court of Appeals and Ottawa Circuit Court. We remand this case to the Ottawa Circuit Court for a hearing pursuant to *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972), and *People v Moore*, 391 Mich 426 (1974), with regard to the scoring of Prior Offense Variable 5. On a showing of indigency, the trial court shall appoint counsel to assist the defendant. The motion for a declaratory judgment and motion to quash answer are denied. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CHAZ SMITH, No. 152390; Court of Appeals No. 328533. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v DERRICK CHAPPEL, No. 152666; Court of Appeals No. 321480. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate footnote 1 of the Court of Appeals judgment, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional restraint on its discretion, it may affirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional restraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v HAWK, No. 152726; Court of Appeals No. 328066. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DINWIDDIE, No. 152974; Court of Appeals No. 322751. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case

to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CEDRICK DUPREE, No. 153012; Court of Appeals No. 329852. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v BERG, No. 153014; Court of Appeals No. 321977. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Saginaw Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ELLIOTT, No. 153404; Court of Appeals No. 331887. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 24, 2016:

PEOPLE v ROARK, No. 152562; Court of Appeals No. 316467. We direct the Clerk to schedule oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Comer* (Docket No. 152713). The Wayne County Prosecutor is invited to file a brief amicus curiae in *People v Comer* (Docket No. 152713).

Leave to Appeal Denied May 24, 2016:

PEOPLE v KEAN, No. 149947; Court of Appeals No. 321446.

NOLAN v CHAPMAN, No. 151701; Court of Appeals No. 319830.

PEOPLE v WILCOX, No. 151760; Court of Appeals No. 326644.

PEOPLE v HOLLOWAY, No. 151767; Court of Appeals No. 326368.

PEOPLE v ANTHONY NELSON, No. 151773; Court of Appeals No. 326398.

PEOPLE v STAPLETON, No. 151865; Court of Appeals No. 326600.

PEOPLE v WILLIE WASHINGTON, No. 151876; Court of Appeals No. 326168.

PEOPLE v KENNETH WRIGHT, No. 151879; Court of Appeals No. 327181.

PEOPLE v ASBURY, No. 151890; Court of Appeals No. 326066.

PEOPLE v WOODYARD, No. 151898; Court of Appeals No. 326565.

PEOPLE v GRISHAM, No. 151904; Court of Appeals No. 326316.

PEOPLE v GLENN, No. 152009; Court of Appeals No. 326863.

PEOPLE v PAINTER, No. 152024; Court of Appeals No. 326042.

PEOPLE v DRAKE, No. 152033; Court of Appeals No. 327099.

PEOPLE v HESS, Nos. 152039 and 152040; Court of Appeals Nos. 326261 and 326580.

PEOPLE v HOUGH, No. 152042; Court of Appeals No. 327702.

PEOPLE v SPEER, No. 152046; Court of Appeals No. 325820.

PEOPLE v DEVI SMITH, No. 152090; Court of Appeals No. 326534.

PEOPLE v JONATHON HILL, No. 152125; Court of Appeals No. 327245.

PEOPLE v CALDWELL, No. 152140; Court of Appeals No. 326180.

PEOPLE v YUL DUPREE, No. 152163; Court of Appeals No. 325361.

PEOPLE v FLOWERS, No. 152167; Court of Appeals No. 327477.

PEOPLE v CLAUSELL, No. 152171; Court of Appeals No. 326175.

PEOPLE v TANNER, No. 152180; Court of Appeals No. 327846.

PEOPLE v CHANDLER, No. 152196; Court of Appeals No. 327885.

In re ST THOMAS ESTATE, No. 152199; Court of Appeals No. 321060.

PEOPLE v JUSTIN WILLIAMS, No. 152218; Court of Appeals No. 327138.

PEOPLE v WINQUIST, No. 152219; Court of Appeals No. 327703.

PEOPLE v PARKER, No. 152226; Court of Appeals No. 327558.

PEOPLE v TUCKER, No. 152227; Court of Appeals No. 327139.

PEOPLE v WARD, No. 152230; Court of Appeals No. 327609.

PEOPLE v YOUNG, No. 152294; Court of Appeals No. 327267.

PEOPLE v ERROLL THOMAS, No. 152298; Court of Appeals No. 327754.

PEOPLE v GOSS, No. 152326; Court of Appeals No. 327440.

PEOPLE v MAYE, No. 152332; Court of Appeals No. 327932.

PEOPLE v MCMAHON, No. 152338; Court of Appeals No. 327879.

PEOPLE v THOMAS DAVIS, No. 152339; Court of Appeals No. 328595.

PEOPLE v ERIC SEABROOKS, No. 152357; Court of Appeals No. 327770.

PEOPLE v WOODWARD, No. 152359; Court of Appeals No. 327758.

PEOPLE v ANTWINE, No. 152370; Court of Appeals No. 328494.

PEOPLE v CARSON, No. 152377; Court of Appeals No. 326582.

PEOPLE v LAMMI, Nos. 152461 and 152462; Court of Appeals Nos. 321628 and 321629.

CITIZENS BANK v BLACK and BLACK LAW OFFICES, PC v CITIZENS BANK, Nos. 152511, 152512, and 152513; Court of Appeals Nos. 318107, 318981, and 318982.

PEOPLE v BROWN, No. 152550; Court of Appeals No. 321599.

BANK OF NEW YORK MELLON v CARMACK, No. 152557; Court of Appeals No. 321840.

PEOPLE v COTTON, No. 152590; Court of Appeals No. 328391.

PEOPLE v JAMERSON, No. 152597; Court of Appeals No. 322802.

PEOPLE v HOLLAND, No. 152612; Court of Appeals No. 320869.

DEUTSCHE BANK NATIONAL TRUST CO v GORDON-WILLIAMS, No. 152658; Court of Appeals No. 321681.

PEOPLE v FLORES, No. 152664; Court of Appeals No. 321483.

NAYYAR v OAKWOOD HEATHCARE, INC, No. 152670; Court of Appeals No. 328277.

GORDON v FLYNN, No. 152683; Court of Appeals No. 318705.

GORDON v FLYNN, No. 152685; Court of Appeals No. 318705.

PEOPLE v PAYTON, No. 152701; Court of Appeals No. 329009.

WIECHMANN v HOME CARE ALTERNATIVES, LLC, No. 152711; Court of Appeals No. 321711.

PONTE v MCLACHLAN, No. 152715; Court of Appeals No. 322258.

PEOPLE v BRANDON JACKSON, No. 152734; Court of Appeals No. 329407.

PEOPLE v BAZZI, No. 152742; Court of Appeals No. 320065.

MABIN v HSBC MORTGAGE SERVICES, INC, No. 152746; Court of Appeals No. 323043.

In re STELLA D JACKSON LIVING TRUST, Nos. 152755 and 152756; Court of Appeals Nos. 321070 and 321072.

PEOPLE v MILLAY, No. 152768; Court of Appeals No. 322616.

PEOPLE v HUNTER, No. 152774; Court of Appeals No. 321302.

PEOPLE v WELLS, No. 152782; Court of Appeals No. 321805.

PEOPLE v ARCHAMBEAU, No. 152783; Court of Appeals No. 321660.

PEOPLE v DIETER, No. 152785; Court of Appeals No. 321831.

PEOPLE v BENFORD, No. 152787; Court of Appeals No. 319301.

PEOPLE v THREATT, No. 152795; Court of Appeals No. 323837.

PEOPLE v THOMPSON, No. 152796; Court of Appeals No. 322197.

PEOPLE v KENNARD, No. 152805; Court of Appeals No. 319308.

PEOPLE v WAINSCOTT, No. 152817; Court of Appeals No. 328857.

PEOPLE v PAGE, No. 152822; Court of Appeals No. 329175.

PEOPLE v WARWICK, No. 152842; Court of Appeals No. 329402.

PEOPLE v TONNIE JOHNSON, No. 152863; Court of Appeals No. 321520.

PEOPLE v CONWAY, No. 152867; Court of Appeals No. 329068.

PEOPLE v MICHAEL DEAN, No. 152869; Court of Appeals No. 328705.

DCL, INC v SCHRAGE, No. 152879; Court of Appeals No. 322959.

PEOPLE v HIGGINS, No. 152883; Court of Appeals No. 322457.

PEOPLE v LEMCOOL, No. 152895; Court of Appeals No. 329578.

PEOPLE v GRACE, No. 152898; Court of Appeals No. 322653.

PEOPLE v MCGEE, No. 152904; Court of Appeals No. 329517.

COMMUNICARE MICHIGAN, LLC v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 152914; Court of Appeals No. 323502.

ROEDER v BANK OF NEW YORK MELLON TRUST, No. 152917; Court of Appeals No. 322792.

PEOPLE v SCHUH, No. 152924; Court of Appeals No. 328647.

PEOPLE v KERN, No. 152926; Court of Appeals No. 322850.

WRIGHT v WRIGHT, No. 152929; Court of Appeals No. 329074.

TAUTKUS v SAUNDERS, No. 152931; Court of Appeals No. 323209.

PEOPLE v LATOSKI, No. 152935; Court of Appeals No. 322369.

PEOPLE v REARICK, No. 152939; Court of Appeals No. 328644.

PEOPLE v DARNELL MILLER, No. 152950; Court of Appeals No. 322711.

YOUNCE v JPMORGAN CHASE BANK, NA, No. 152952; Court of Appeals No. 323242.

PEOPLE v WILLIAM THOMAS, No. 152954; Court of Appeals No. 321822.

PEOPLE v MCCRORY, No. 152961; Court of Appeals No. 311205.

PEOPLE v CURTIS MARTIN, No. 152967; Court of Appeals No. 329796.

PEOPLE v TYWONE BROWN, No. 152982; Court of Appeals No. 323457.

PEOPLE v DILTZ, No. 152990; Court of Appeals No. 329694.

PEOPLE v SEAN LEWIS, No. 152991; Court of Appeals No. 329391.

PEOPLE v HOWARD, No. 152995; Court of Appeals No. 322868.

PEOPLE v KENNETH FORD, No. 152996; Court of Appeals No. 323317.

PEOPLE v CAMP, No. 152998; Court of Appeals No. 322291.

PEOPLE v DOUGLAS TAYLOR, No. 153005; Court of Appeals No. 322426.

PEOPLE v FARLEY, No. 153006; Court of Appeals No. 329221.

PEOPLE v PRINCESS WILLIAMS, No. 153018; Court of Appeals No. 329399.

PEOPLE v PITTS, No. 153033; Court of Appeals No. 328340.

PEOPLE v BENJAMIN COLEMAN, No. 153034; Court of Appeals No. 323662.

PEOPLE v CARLTON, No. 153037; Court of Appeals No. 329647.

PEOPLE v HAINS, No. 153045; Court of Appeals No. 322507.

PEOPLE v MABEN, No. 153062; Court of Appeals No. 321732.

PEOPLE v DENNIS, No. 153066; Court of Appeals No. 321334.

PEOPLE v BEVERLY, No. 153067; Court of Appeals No. 322419.

PEOPLE v TROMBINO, No. 153077; Court of Appeals No. 321838.

PEOPLE v FLOYD, No. 153078; Court of Appeals No. 328406.

PEOPLE v DEMAL SIMMONS, No. 153096; Court of Appeals No. 320216.

PEOPLE v KANGAS, No. 153098; Court of Appeals No. 323088.

BAKKER v NORTHERN MICHIGAN UNIVERSITY, No. 153100; Court of Appeals No. 323589.

PEOPLE v CIVIS, No. 153101; Court of Appeals No. 329988.

PEOPLE v DEMARCUS REED, No. 153103; Court of Appeals No. 323234.

PEOPLE v KEEFER, No. 153107; Court of Appeals No. 330254.

PEOPLE v COLE, No. 153127; Court of Appeals No. 320016.

PEOPLE v ANDERSON, No. 153137; Court of Appeals No. 323764.

PEOPLE v DARRYL SMITH, No. 153148; Court of Appeals No. 323026.

PEOPLE v TYRONE SANDERS, No. 153151; Court of Appeals No. 330303.

ROTH v ROTH, No. 153187; Court of Appeals No. 329215.

PEOPLE v QURESHI, No. 153248; Court of Appeals No. 323247.

PEOPLE v LORENZO JOHNSON, No. 153258; Court of Appeals No. 323312.

PEOPLE v OZIER, No. 153288; Court of Appeals No. 330360.

PEOPLE v WILDER, No. 153291; Court of Appeals No. 329708.

PEOPLE v HOLDA, No. 153307; Court of Appeals No. 328540.

PEOPLE v GODBOLDO, No. 153323; Court of Appeals No. 323261.

RICHARDSON v KENNEDY, No. 153363; Court of Appeals No. 327771.

In re RHEA BRODY LIVING TRUST, No. 153378; Court of Appeals No. 330224.

SOLOMON v SMITH, No. 153403; Court of Appeals No. 327979.

PEOPLE v ALEXANDER, No. 153474; Court of Appeals No. 331430.

In re RHEA BRODY LIVING TRUST, No. 153553; Court of Appeals No. 330224.

Application for Leave to Appeal Dismissed May 24, 2016:

GRIEVANCE ADMINISTRATOR v WEIHERMULLER, No. 153109. On order of the

Court, the motion for stay is denied. The application for leave to appeal is considered, and it is dismissed, because the petitioner has not been aggrieved by a "final order" entered by the Attorney Discipline Board. MCR 9.122(A)(1); MCR 7.303(B)(2).

Reconsideration Denied May 24, 2016:

PEOPLE v CLEMONS, No. 150870; Court of Appeals No. 324012. Leave to appeal denied at 499 Mich 854.

PEOPLE v GONSER, No. 151118; Court of Appeals No. 324482. Leave to appeal denied at 499 Mich 854.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

WHITE v ST JOHN MACOMB HOSPITAL, No. 151355; Court of Appeals No. 316751. Leave to appeal denied at 499 Mich 854.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v KINNEY, No. 151630; Court of Appeals No. 325948. Leave to appeal denied at 499 Mich 855.

PEOPLE v GILMORE, No. 152234; Court of Appeals No. 326776. Leave to appeal denied at 499 Mich 857.

Summary Disposition May 25, 2016:

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES v STATE OF MICHIGAN, No. 147511; Court of Appeals No. 304920. On May 4, 2016, the Court heard oral argument on the application for leave to appeal the June 20, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Court of Claims for issuance of an order granting summary disposition in favor of the defendants on Count I of the Complaint. The Civil Service Commission has "plenary and absolute" authority to set rates of compensation and to determine the procedures by which it makes those compensation decisions. See *UAW v Green*, 498 Mich 282, 288 (2015). The consensus agreement purports to bind the parties to jointly recommend certain wage increases for civil service employees, and was part of the process by which the Civil Service Commission fixed rates of compensation. The plaintiff's breach of contract claim arises out of the exclusive constitutional authority of the Civil Service Commission to "fix rates of compensation" for the classified service. Const 1963, art 11, § 5. Judicial incursion into that process is "unavailing." *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 408 (1980). The motion to supplement the record is

considered, and it is denied. Evidence regarding the amount of damages is irrelevant because the controversy fell exclusively within the purview of the Civil Service Commission.

ALLARD v ALLARD, No. 150891; reported below: 308 Mich App 536. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we affirm in part, vacate in part, and reverse in part the December 18, 2014 judgment of the Court of Appeals. The parties' antenuptial agreement provided, among other things, that certain property acquired during the marriage was to remain the sole and separate property of each party (i.e., part of the party's separate estate), including "[a]ny property acquired in either party's individual capacity or name during the marriage[.]" Despite the antenuptial agreement, the defendant sought to invade the plaintiff's separate estate pursuant to MCL 552.23(1) and MCL 552.401. The Court of Appeals held that MCL 552.23(1) and MCL 552.401 do not "allow a party to invade the other spouse's separate estate contrary to the terms of a valid antenuptial agreement." *Allard v Allard*, 308 Mich App 536, 558 (2014). We vacate the Court of Appeals' analysis of this issue. The parties' antenuptial agreement rendered much of the property at issue part of the plaintiff's separate estate. If the antenuptial agreement did nothing more than divide the property between the marital estate and the parties' separate estates, the trial court could exercise its discretion under MCL 552.23(1) and MCL 552.401 to invade the plaintiff's separate estate. However, the property settlement in the antenuptial agreement was to be "in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce . . . , under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released)." The Court of Appeals did not address whether this statement waived the defendant's ability to seek invasion of the plaintiff's separate estate under MCL 552.23(1) and MCL 552.401. Therefore, we remand this case to the Court of Appeals for it to consider: (1) whether parties may waive the trial court's discretion under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement, see, e.g., *Staple v Staple*, 241 Mich App 562 (2000), but see, e.g., *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305 (1999), and (2) if so, whether the parties validly waived MCL 552.23(1) and MCL 552.401 in this case.

Moreover, the Court of Appeals erred when it held "to the extent any real property or other assets were acquired during the course of the marriage by the various [limited liability companies] created during the marriage, we find that their disposition in this divorce action is *not* governed by the antenuptial agreement." *Allard*, 308 Mich App at 563-564. A limited liability company member, such as the plaintiff, "has no interest in specific limited liability company property." MCL 450.4504(2). But, the plaintiff's membership interest is personal property. MCL 450.4504(1). It is undisputed that all the limited liability companies

at issue were created by and titled in the plaintiff's name only. As a result, he has a 100% membership interest in all relevant limited liability companies. And, under the antenuptial agreement, that membership is property acquired in the plaintiff's name during the marriage, thereby making it his "sole and separate property." Accordingly, the Court of Appeals erred by concluding otherwise, and we reverse those parts of the Court of Appeals opinion inconsistent with this order.

Finally, we affirm the Court of Appeals' conclusion that "the antenuptial agreement does not treat the income earned by the parties during the marriage as separate property." *Allard*, 308 Mich App at 564. However, we vacate those parts of the Court of Appeals opinion addressing what income may be treated as marital income. As the Court of Appeals recognized, "[t]he trial court made no findings concerning the extent of marital income earned by the parties, and thus remand is required for further development of the record on this question." *Id*. We leave it to the trial court to fully address this issue on remand from the Court of Appeals. We do not retain jurisdiction.

PEOPLE v TOMAZ, No. 152112; Court of Appeals No. 318663. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ZAID, No. 152319; Court of Appeals No. 320197. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment discussing the weight and effect of the evidence presented at the preliminary examination and directing arraignment in the Oakland Circuit Court on a felony information. The Court of Appeals erred in making factual findings and binding over this case to the circuit court for trial. We remand this case to the 52-4 District Court for further proceedings not inconsistent with the remainder of the Court of Appeals judgment. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

PEOPLE v KUSK, No. 153315; Court of Appeals No. 324107. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. As noted by dissenting Judge Michael J. Kelly, the defendant's attorney did not perform ineffectively at trial by failing to request a self-defense jury instruction. There was testimony that the defendant was the initial aggressor; thus, counsel may have

made a legitimate strategic decision that self-defense was not a viable defense theory. See *People v Riddle*, 467 Mich 116 (2002). The defendant's trial counsel pursued a theory focused on arguing the defendant's innocence of the felony charges of felonious assault and felony-firearm. This strategy was successful in that the defendant was acquitted of these offenses and was convicted only of the misdemeanor offense of domestic assault. MCL 750.81(2). This was a legitimate trial strategy. See *Florida v Nixon*, 543 US 175, 185-192; 125 S Ct 551; 160 L Ed 2d 565 (2004); *People v Wise*, 134 Mich App 82, 97-99 (1984). We reinstate the defendant's conviction and sentence.

Leave to Appeal Granted May 25, 2016:

PEOPLE V STEANHOUSE and PEOPLE V MASROOR, Nos. 152671, 152849, 152871, 152872, 152873, 152946, 152947, and 152948; reported below: 313 Mich App 1. On order of the Court, the applications for leave to appeal the October 22, 2015 judgment of the Court of Appeals in *People v Steanhouse* (Docket No. 152671 and Docket No. 152849) and the applications for leave to appeal the November 24, 2015 judgment of the Court of Appeals in *People v Masroor* (Docket Nos. 152871-3 and Docket Nos. 152946-8) are considered. Leave to appeal is granted in *Steanhouse* in Docket No. 152849 and in *Masroor* in Docket Nos. 152946-8, and the cases shall be argued and submitted to the Court together at such future session of the Court as both cases are ready for submission. The parties in each case shall address: (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae addressing the four issues set forth above. Other persons or groups interested in the determination of the issues presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *Steanhouse* Docket No. 152849 only *and served on the parties in both cases*.

The total time allowed for oral argument by the parties shall be 60 minutes, with 15 minutes for each party. MCR 7.314(B). Following the arguments by the parties, we invite the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan to participate in oral argument to address the first and fourth issues set forth above. Each shall be permitted 10 minutes of argument.

The other applications for leave to appeal (*Steanhouse* Docket No. 152671 and *Masroor* Docket Nos. 152871-3) remain pending.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 25, 2016:

PERKOVIC v ZURICH AMERICAN INSURANCE COMPANY, No. 152484; reported below: 312 Mich App 244. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff, or someone on his behalf, satisfied the notice requirements of MCL 500.3145(1). The parties should not submit mere restatements of their application papers.

NIKOLA v MIC GENERAL INSURANCE COMPANY, No. 152535; reported below: 312 Mich App 374. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether an insured making a claim for underinsured motorist benefits may be considered to be a "third party tort claimant" under MCL 500.2006(4), thereby requiring the insurer to pay twelve percent interest for failing to pay the claim on a timely basis *only if* the claim "is not reasonably in dispute"; and (2) whether the Court of Appeals decision in this case is consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341 (1998), and *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551 (2007). The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 25, 2016:

PEOPLE v DOUGLAS, No. 150789; Court of Appeals No. 315027. On March 9, 2016, the Court heard oral argument on the application for leave to appeal the August 7, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v GRANDERSON, No. 152150; Court of Appeals No. 321113.

PEOPLE v DANIELS, No. 152175; reported below: 311 Mich App 257.

PEOPLE v WATKINS, No. 152190; Court of Appeals No. 320318.

PEOPLE v JAMES HILL, No. 152581; Court of Appeals No. 328788.

PEOPLE v NASER, No. 152789; Court of Appeals No. 320388.

MEEMIC INSURANCE COMPANY v MICHIGAN MILLERS MUTUAL INSURANCE, No. 152793; reported below: 313 Mich App 94.

PEOPLE v ZABLOCKI, No. 153189; Court of Appeals No. 328152.

Order of Public Censure and Suspension Entered May 25, 2016:

In re HON. ELIZABETH BIOLETTE CHURCH, No. 152830. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, Hon. Elizabeth Biolette Church, Chippewa County Probate and District Court Judge, consents. It is accompanied by a settlement agreement, in which the respondent waived her rights and consented to a sanction no greater than a public censure and a 120-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> Everything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

1. The respondent is, and at all material times was, a judge of the Chippewa County Probate and District Court in Sault Ste. Marie, Michigan.

2. As a judge, she is subject to all the duties and responsibilities imposed on judges by this Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. Over the course of the last several years, respondent reduced charges, dismissed charges outright, or modified sentences in at least 20 criminal cases, without holding a hearing and where she had no explicit authority from the prosecutor to do so. Those 91st District Court cases are: *People v Tenecyck* (Case No. 13-55757-ST); *People v Stebleton* (Case No. 13-7804-SI); *People v Debolt* (Case No. 13-8954-ST); *People v Reiswitz* (Case No. 13-8812-SI); *People v Hough* (Case No. 13-56209-SM); *People v Swiger* (Case No. 13-7402-SI); *People v Payment* (Case No. 14-10642-01); *People v Brand* (Case No. 13-9214-SI); *People v Parr* (Case No. 13-6874-SI); *People v Wiezbenski* (Case No. 13-7024-SI); *People v Captain* (Case No. 12-6474-SI); *People v Gagnon* (Case No. 11-53224-SM); *People v Gunckel* (Case No. 14-57103-SM); *People v Morningstar* (Case No. 14-11943-SM); *People v Keesler* (Case No. 14-57118-ST); *People v Mellea* (Case No. 14-57254-SM); *People v Manos* (Case No. 14-11974-SI); *People v Hatfield* (Case No. 14-12032-SI); *People v Dicks* (Case No. 14-12080-SJ); and *People v Homminga* (Case No. 14-587515-SD).

4. Over the course of the last several years, respondent dismissed at least 32 ticket cases without holding a hearing and where she had no explicit authority from the prosecutor to do so. Those 91st District Court cases are: *People v Smith Family Sanitation* (Case No. 12-4859-SI); *People v Beland* (Case No. 12-4891-SI); *People v Huyck* (Case No. 12-4889-ST); *People v Greene* (Case No. 12-4978-SI); *People v Heikkinen* (Case Nos. 12-4916-OI, 12-4917-OI, and 12-4918-OI); *People v Mitchell* (Case No. 12-5089-OI); *People v Karakas* (Case No. 12-51 04-SI); *People v Bagwan* (Case No. 12-5452-SI); *People v Eggart* (Case Nos. 12-5651-SI & 12-5652-SI); *People v Rogers* (Case No. 12-5690-SI); *People v Fox Excavating* (Case No. 12-5714-SI); *People v McLeod* (Case No. 12-5786-SI); *People v Reynoso* (Case No. 12-5795-SI); *People v Nietling* (Case No. 12-5800-SI); *People v Heather Goudge* (Case No. 12-5855-SI); *People v Bertram* (Case No. 12-5914-SI); *People v Schuster* (Case No. 12-5919-SI); *People v Hiatt* (Case No. 12-5926-SI); *People v Mongene* (Case No. 12-6015-SI); *People v Akers* (Case No. 12-6090-SI); *People v Parr* (Case No. 12-6117-SI); *People v Cardiff* (Case No. 12-6221-01); *People v McEwen* (Case No. 12-6250-SI); *People v Miller* (Case No. 12-6349-SI); *People v Johnston* (Case No. 12-6411-SI); *People v Bosley* (Case No. 12-6439-SI); *People v Saluja* (Case No. 12-6443-OI); *People v Morley* (Case No. 12-6446-OI); *People v Schwiderson* (Case No. 12-6492-SI); *People v Poth* (Case No. 12-6653-OI); *People v Dumback* (Case No. 12-6597-SI); and *People v Shuman* (Case No. 13-7084-SM).

5. In the matters referred to above, respondent engaged in ex parte communications by considering substantive matters relevant to the merits of the pending proceedings, without the knowledge or consent of the prosecuting attorney.

6. Respondent also engaged in ex parte contacts as follows:

(a) *People v Betlam* (50th Circuit Case No. 13-001221-FC)

i. This matter was before respondent on January 16, 2014 for a bench trial.

ii. Before the trial started, respondent, accompanied by defense counsel Jennifer France, went to the holding cell where Mr. Betlam was being held by the Chippewa County Sheriff's Department.

iii. Respondent met there with Mr. Betlam, in the presence of Ms. France, but without the knowledge of the prosecuting attorney.

iv. Respondent never told the prosecutor of her ex parte meeting with the defendant, Mr. Betlam, nor did she ever make a record of the event.

(b) *People v Ferraro*

i. Respondent was assigned to preside over *People v Ferraro*, 91st District Case Nos.:

(1) 15-58203-SM (filed on or around April 27, 2015, charging the defendant with domestic violence, contrary to MCL 750.812) and

(2) 15-58285-SM (filed on or around May 28, 2015, charging defendant with domestic violence, 2nd offense, contrary to MCL 750.812, and 4th-degree child abuse, contrary to MCL 750.136b[7]).

ii. On April 28, 2015, respondent disqualified herself on her own motion in Case No. 15-58203-SM, and on June 3, 2015 she did so in Case No. 15-58285-SM, indicating in both matters that she believed that her continued assignment would create an appearance of impropriety.

iii. Respondent added the following on the disqualification order in Case No. 15-58203-SM: "DEFENDANT IS THE SON OF BLDG MAINTENANCE MAN WHO IS PART OF ONGOING JTC INVESTIGATION." [sic]

iv. The State Court Administrative Office (SCAO) assigned Judge Beth Gibson of the 92nd District Court to preside over Case No. 15-58203-SM on May 1, 2015 and over Case No. 15-58285-SM on June 8, 2015.

v. On June 12, 2015, Mr. Ferraro pleaded guilty to one charge of domestic violence (Case No. 15-58203-SM) and one charge of domestic violence-second offense (Case No. 15-58285-SM); the child abuse charge was dismissed without prejudice.

vi. In Case No. 15-58203-SM, Judge Gibson sentenced Mr. Ferraro to 93 days in jail, with 17 days credit and the remaining 76 days suspended. Judge Gibson also imposed $500 in fines and costs and placed Mr. Ferraro on 12 months of probation.

vii. In Case No. 15-58285-SM, Judge Gibson placed Mr. Ferraro on 24 months of probation and imposed $750 in fines and costs.

viii. In both cases, Judge Gibson continued a no-contact order against Mr. Ferraro regarding the victim.

ix. On July 8, 2015, charges were filed against the same Mr. Ferraro in Case No. 15-58414-FY, alleging that he had used a computer to commit a crime, contrary to MCL 752.796 and 752.797(3)(d), as well as aggravated stalking, contrary to MCL 750.411i, and malicious use of telecommunications services, contrary to MCL 750.540e.

x. The charges against Mr. Ferraro in Case No. 15-58414-FY were filed while he was still on probation in Case Nos. 15-58203-SM and 15-58285-SM.

xi. Respondent disqualified herself on her own motion from Case No. 15-58414-FY on July 8, 2015, indicating that she believed that her continued assignment would create an appearance of impropriety.

xii. Respondent added the following on the disqualification order in Case No. 15-58414-FY: "Defendant has had two very recent cases that Judge Church has recused on as well." [sic] The two cases referred to were Case Nos. 15-58203-SM and 15-58285-SM.

xiii. SCAO assigned Judge Beth Gibson of the 92nd District Court to preside over Case No. 15-58414-FY on July 9, 2015.

xiv. Respondent sent two texts to Judge Gibson regarding Case No. 15-58414-FY.

xv. On July 7, 2015, at 5:15 p.m., respondent texted Judge Gibson:

"I am group texting both Judge Gibson in [sic] John Feroni I have been contacted by MSP regarding Carmen Ferraro they will be submitting report to the Circuit C [sic]ourt [sic] to the prosecutor and to you John for probation violation. Acid [sic] a report be sent all three and I told him that Judge Gibson will hear the matter

"It was trooper Bitnar"

xvi. On July 16, 2015, at 4:52 p.m., respondent texted Judge Gibson:

"I could really use that boy on community service so hurry and send the Ferraro kid"

7. In *People v Martinez* (91st District Case No. 14-57336-EX), respondent declined to appoint a translator for the defendant when she should have.

The standards set forth in *Brown* are also being applied to the Judicial Tenure Commission legal conclusions to which the respondent stipulated and which we adopt as our own. The Commission concludes, and we agree, that the respondent's conduct constitutes:

> (a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
>
> (b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205(B);
>
> (c) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;
>
> (d) Failure to be faithful to the law and maintain professional competence in it, contrary to Code of Judicial Conduct Canon 3A(1);
>
> (e) Participation in *ex parte* communications, and consideration of them outside the presence of all parties concerning pending or impending proceedings, in violation of Code of Judicial Conduct Canon 3A(4); and
>
> (f) A failure to adopt the usual and accepted methods of doing justice, in violation of Code of Judicial Conduct Canon 3A(9).

After review of the Judicial Tenure Commission's decision and recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Elizabeth Biolette Church be publicly censured and suspended without pay for 120 days. Were we to apply the *Brown* factors in the first instance, we may have reached an alternate result. However, in light of respondent's disclosed serious and debilitating medical condition, in addition to her acceptance of responsibility, the unique circumstances of this case warrant our deference to the Judicial Tenure Commission's recommended sanction. During the period of suspension, Judge Church shall

not enter any courthouse in Chippewa County or initiate communication with the staff of any courthouse in Chippewa County unless she has a personal matter pending in any of those courts and then only to the extent that any other member of the public would have access to the court or the court staff. This order stands as our public censure.

Leave to Appeal Granted May 27, 2016:

COVENANT MEDICAL CENTER, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 152758; Court of Appeals No. 322108. The parties shall include among the issues to be briefed: (1) whether a healthcare provider has an independent or derivative claim against a no-fault insurer for no-fault benefits; (2) whether a healthcare provider constitutes "some other person" within the meaning of the second sentence of MCL 500.3112; and (3) the extent to which a hearing is required by MCL 500.3112.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 27, 2016:

HOBSON v INDIAN HARBOR INSURANCE COMPANY, No. 151447; Court of Appeals No. 316714. On May 4, 2016, the Court heard oral argument on the application for leave to appeal the March 10, 2015 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

ZAHRA, J. (*concurring*). Although the question whether the total pollution exclusion endorsement (the Endorsement) of the underlying commercial general liability (CGL) policy precludes coverage when applied to the facts presented in this case is an interesting one, I nonetheless conclude that the application of the defendant insurers[1] for leave to appeal should be denied.

Defendant is correct that this Court has made it abundantly clear that Michigan does not interpret insurance contracts under the rule of reasonable expectations or any rule of construction comparable to it. *Rory v Continental Ins Co*, 473 Mich 457, 469-470 (2005); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63 (2003). Insurance contracts are interpreted according to their plain terms. "Well-settled principles of contract interpretation require one to first look to a contract's plain language. If the plain language is clear, there can be only one reasonable

[1] Although there were numerous defendants, only Indian Harbor Insurance Company, XL Insurance America, Inc., and XL Insurance Company of New York, Inc., appealed. For the sake of simplicity, I will refer to the appellants in the singular as "defendant" throughout this statement.

interpretation of its meaning and, therefore, only one meaning the parties could reasonably expect to apply." *Singer v American States Ins*, 245 Mich App 370, 381 n 8 (2001).

Under this rule of interpretation, defendant has presented a colorable argument that the Endorsement, which altered "Exclusion f" and removed the "hostile fire" exception from that exclusion, operates literally to exclude any damage from smoke. Yet I also believe that under the same rule of contract interpretation, a reasonable argument can be advanced that, notwithstanding the removal of the hostile-fire exception, smoke did not discharge, disperse, seep, migrate, release, or escape in relation to the insured property. The CGL policy insures the entire apartment building in which the fire began. Before the Endorsement, damage caused by smoke wholly *within* the apartment building was excluded unless it was the result of a "hostile fire."[2]

Exclusion f originally provided:

> **f. Pollution**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> **(a)** *At or from any premises*, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
>
> * * *
>
> **(iii)** "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"[.] [Emphasis added.]

The Endorsement at issue provides that Exclusion f "is replaced by the following":

> This insurance does not apply to:
>
> **f. Pollution**
>
> **(1)** "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

Under the original Exclusion f, damage caused by "smoke" was excluded only when it was discharged, was dispersed, seeped, migrated, was released, or escaped "[*a*]*t or from* any premises . . . owned or occupied by . . . any insured." (Emphasis added.) The original provision went on to except from this exclusion damage caused by "heat, smoke or fumes from a 'hostile fire'[.]"

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[2] Under the CGL policy, " '[h]ostile fire' means one which becomes uncontrollable or breaks out from where it was intended to be."

Defendant points out that the Endorsement removed the hostile-fire exception to Exclusion f that otherwise would have allowed coverage in this case for smoke damage at the insured property. But the Endorsement also removed the restriction that had initially excluded smoke damage only if it had moved "at or from" the insured property. Although the Endorsement still requires the discharge, dispersal, seepage, migration, release, or escape of pollutants, the Endorsement no longer requires that the pollutants do so *at* the insured property.

Had the smoke been discharged, been dispersed, seeped, migrated, been released, or escaped from the apartment building or into the apartment building, the CGL policy would very likely exclude the resulting damage. But because the CGL policy no longer expressly excludes smoke damage if the smoke had moved "at" the insured property, defendant's argument that the "smoke from the fire that started in another unit had to have dispersed, seeped, or migrated into the Plaintiffs [sic] unit, and had to have been released or escaped from the unit where the building manager allegedly started the fire" is questionable and without any support in the language of the policy. The CGL policy does not differentiate between individual units within the apartment building. Under the Endorsement, once smoke has been produced "at" the insured premises, it must still be discharged, be dispersed, seep, migrate, be released, or escape from the insured premises. Otherwise, the Endorsement would simply have been phrased to exclude " '[b]odily injury' or 'property damage' which would not have occurred in whole or part but for actual, alleged or threatened 'pollutants' at any time."

As noted by defense counsel during oral argument, this particular aspect of the insurance policy and its Endorsement were not developed by plaintiffs in the lower courts.[3] Relying on its criticisms of the unpublished opinion of the Court of Appeals,[4] defendant would have this Court limit its review of the policy and Endorsement to the removal of the hostile-fire exception to Exclusion f and ignore the other changes to the policy brought about by the Endorsement. I decline to accept defendant's invitation. Thus, while this case presents an interesting

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[3] Not only was there no legal development of this particular aspect of the Endorsement, there also was no factual development of the instant case because defendant insurer denied its insured a defense to plaintiffs' claims. Defendant denied its duty to defend its insured because, it maintained, the underlying claim was based exclusively on damages caused by smoke, which is defined as an excluded pollutant under the policy. Stated more simply, defendant denied its duty to defend because it believed the underlying claim in no way alleged damages resulting from fire. Defendant's position is puzzling. While the complaint does in large part allege smoke inhalation injuries, it also alleges damages "due to fire."

[4] *Hobson v Indian Harbor Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2015 (Docket No. 316714).

question of contract interpretation, because the record is undeveloped with regard to what constitutes a discharge, dispersal, seepage, migration, release, or escape under the Endorsement, I agree with my colleagues that leave should be denied.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

TITAN INSURANCE COMPANY v AMERICAN COUNTRY INSURANCE COMPANY and BRONSON METHODIST HOSPITAL v TITAN INSURANCE COMPANY, Nos. 152492 and 152493; reported below: 312 Mich App 291.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would instead grant leave to appeal to address whether the Legislature, when it enacted the no-fault act, MCL 500.3101 *et seq*., intended to undermine in these circumstances a fundamental principle of insurance law that "[i]t is impossible to hold an insurance company liable for a risk it did not assume." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567 (1992).

In each of these consolidated cases, a company owned several vehicles and was in the business of transporting passengers. In each case, an individual who lacked no-fault insurance was injured in an accident while occupying one of the vehicles. Although the companies had failed to insure the vehicles involved in the accidents, American Country Insurance Company insured one or more *other* vehicles in each company's fleet. The Court of Appeals ruled in both cases that American Country was liable to pay no-fault benefits despite *not* having contracted to insure the vehicles involved in the accidents, concluding that under MCL 500.3114(4)(a), "because American Country insured *other* vehicles owned by [the companies], it is responsible for the claims in these cases." *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 302 (2015) (emphasis added).

MCL 500.3114(4) provides, in relevant part, that

> [e]xcept as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.

In my judgment, the Court of Appeals almost certainly erred by concluding that American Country was the "insurer of the owner or registrant" merely because it insured *another* vehicle owned by each of the companies. It is quite likely that the companies had additional insurers for concerns such as fire, theft, flood, healthcare, and workers' compensation, and the Court of Appeals' interpretation fails to address the threshold question of *which* of each company's insurers, if any, constitutes the true "insurer of the owner or registrant" for purposes of MCL 500.3114(4)(a).

I do not question that the "insurer of the owner or registrant" is limited to no-fault insurers, and for this reason, the flood insurer cannot be liable for paying no-fault benefits here. When the no-fault act is read as a whole, it is apparent that "the insurer" must be a no-fault insurer. See *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 117 (2006) ("MCL 500.3114 should be read in context with chapter 31 [the no-fault chapter of the Insurance Code], and therefore 'the insurer' as provided in MCL 500.3114(5)(a) is limited to no-fault insurers."). However, it is also arguable that when the no-fault act is read as a whole, "the insurer" must be a no-fault insurer of the *vehicle involved in the accident*. Stated otherwise, if a court is to avoid the peculiar outcome whereby the flood insurer is responsible for paying no-fault benefits, it must interpret MCL 500.3114(4)(a) in the context of the no-fault act and accordingly read language into the statute: "the insurer [that provides no-fault insurance to] the owner or registrant." I see nothing improper with examining this same context in *further* concluding that the interpretation of "the insurer" in MCL 500.3114(4)(a) does not give rise to the equally peculiar outcome of referring, not to the insurer of the owner with respect to the vehicle involved in the accident, but to the insurer of *another* vehicle.

MCL 500.3113(b)[1] and MCL 500.3173[2] of the no-fault act connect insurance coverage to the vehicle involved in the accident and specifically exclude from coverage persons who have failed to obtain a no-fault policy for that vehicle. In addition, MCL 500.3101(1)[3] and MCL

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[1] MCL 500.3113 provides that

> [a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by [MCL 500.3101 or MCL 500.3103] was not in effect.

[2] MCL 500.3173 provides that "[a] person who because of a limitation or exclusion in [MCL 500.3105 to MCL 500.3116] is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan."

[3] MCL 500.3101(1) provides, in relevant part, that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."

500.3102(1)[4] of the no-fault act require the owner or registrant of a vehicle to maintain insurance for all vehicles owned and registered in Michigan or operated here. Put simply, these four statutes together provide that the vehicle involved in an accident must be covered by a no-fault policy issued by the relevant insurer for that insurer to be liable to pay no-fault benefits. Accordingly, because American Country did not issue a no-fault policy for the vehicles involved in the accidents, the Court of Appeals likely erred by ruling that it was liable to pay benefits under the no-fault act.

Furthermore, insurance entails "a contract between two parties, in which one party (the insurer) *agrees to assume the risk* of another party (the insured) in exchange for consideration, with the insurer distributing the accepted risk across a group of persons similarly situated with respect to the risk insured." *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 646 (1994) (GRIFFIN, J., concurring in part and dissenting in part) (emphasis added).[5] As American Country did not agree to assume the risk of insuring all vehicles in each company's fleet, such an obligation cannot be imposed because of American Country's mere status as an insurer. Concluding otherwise would be inconsistent with this Court's longstanding recognition that "[t]he rights and duties of parties to [an insurance] contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62 (2003). There is nothing to suggest that the no-fault act was intended to impose unanticipated liability on a no-fault insurer, contrary to the terms of its contract with the insured.

Put simply, I discern little basis for imposing responsibility on American Country to pay no-fault benefits when American Country, as with every other insurer of the business, had no contractual responsibility—and received no premiums—with respect to the specific vehicles involved in the accidents. Neither the no-fault act nor principles of insurance or contract law suggest such a result. Yet as a consequence of the Court of Appeals' published opinion, insurers like American Country will now be responsible for risks extending far beyond what they may have assumed when agreeing to provide insurance. Such a consequence, in my estimation, will likely compel insurers to disproportionally increase premiums on individuals and

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[4] MCL 500.3102(1) provides that

> [a] nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

[5] The Court later adopted the analysis of Justice GRIFFIN's *Marzonie* plurality opinion in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 115 (1999).

companies that own multiple vehicles to compensate for the imposition of this unanticipated risk, thereby imposing an unwarranted financial cost on those individuals and companies. Moreover, I note that the Court of Appeals has imposed similar responsibility on insurers under other provisions of the no-fault act, see *Farmers Ins Exch*, 272 Mich App at 113 ("MCL 500.3114(5)(a) states that the insurer need not insure the vehicle in the accident, but must insure the owner or registrant."); *Pioneer State Mut Ins v Titan Ins Co*, 252 Mich App 330, 335-336 (2002) ("[MCL 500.3115(1)(a)] does not mandate that the vehicle involved in the accident must have been insured by the insurer of the owner before an injured person can seek benefits."). I would grant leave to appeal to address whether the outcome in this case is truly consistent with the Legislature's intentions. I would further urge the Legislature itself to assess whether the outcome here is consonant with its intentions with regard to both the no-fault act and the insurance laws generally.

PEOPLE v HAMILTON, No. 152585; Court of Appeals No. 328702.

Order Closing File Entered May 27, 2016:

In re HON. RICHARD B HALLORAN, No. 152259. On order of the Court, this matter is hereby closed given the Judicial Tenure Commission's January 11, 2016 order of dismissal of Formal Complaint No. 97.

Summary Disposition June 1, 2016:

PEOPLE v TROJANEK, No. 151947; Court of Appeals No. 326885. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issues not addressed by that Court during its initial review of this case. With regard to the defendant's challenge to costs, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. The motion to amend the application for leave to appeal is denied.

PEOPLE v HATHAWAY, No. 152121; Court of Appeals No. 320870. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Saginaw Circuit Court to determine whether the court would have imposed a materially different sentence under the sentence procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is

denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v GREGORY TAYLOR, No. 152334; Court of Appeals No. 327717. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 1, 2016:

In re CONTEMPT OF DORSEY, No. 150298; reported below: 306 Mich App 571. By order of December 23, 2015, the application for leave to appeal the September 9, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Jones* (Docket No. 152595). On order of the Court, the order granting leave to appeal having been vacated in *In re Jones*, 499 Mich 862 (2016), the application is again considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the family court lacked subject matter jurisdiction to issue the order compelling the appellant to submit to random drug testing as part of her son's juvenile delinquency proceeding, see MCL 712A.6; *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544-545 (1935); (2) whether Michigan recognizes any other exceptions to application of the collateral bar rule, including (a) lack of opportunity for meaningful appellate review of the January 14, 2011 drug testing order; or (b) the appellant's irretrievable surrender of constitutional guarantees by complying with the drug testing order, see *Maness v Meyers*, 419 US 449; 95 S Ct 584; 42 L Ed 2d 574 (1975); and (3) whether the appellant has properly preserved question (2) for appellate review. The parties should not submit mere restatements of their application papers or their previously filed supplemental briefs.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 1, 2016:

PEOPLE v RICHARD ARNOLD, No. 151454; Court of Appeals No. 324489.

PEOPLE v DAVENPORT, No. 151549; Court of Appeals No. 325140.

PEOPLE v HANNEMAN, No. 151639; Court of Appeals No. 326101.

PEOPLE v BOUGHNER, No. 151664; Court of Appeals No. 325317.

SALEM SPRINGS, LLC v SALEM TOWNSHIP, No. 152455; reported below: 312 Mich App 210.

SCHOENECKERS, INC v DEPARTMENT OF TREASURY, No. 152522; Court of Appeals No. 321033.

PEOPLE v MCGINNIS, No. 152558; Court of Appeals No. 320629.

PEOPLE v HARBIN, No. 152660; Court of Appeals No. 322857.

PEOPLE v WINRICK, No. 153293; Court of Appeals No. 329541.

Leave to Appeal Denied June 3, 2016:

In re HELGE, No. 153705; Court of Appeals No. 329082.

Amended Order Entered June 3, 2016:

CLAM LAKE TOWNSHIP v DEPARTMENT OF LICENSING & REGULATORY AFFAIRS, No. 151800; Court of Appeals No. 325350. Leave to appeal granted 499 Mich 896. On order of the Court, this Court's April 6, 2016 order is amended, to correct a clerical error, and reads as follows:

On order of the Court, the application for leave to appeal the May 26, 2015 order of the Court of Appeals is considered, and it is granted. The parties shall include among the issues to be briefed: (1) whether *Casco Twp v State Boundary Comm*, 243 Mich App 392, 399 (2000), correctly held that the State Boundary Commission (SBC) has the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425); (2) if so, whether the SBC in this case properly determined that the appellant townships' Act 425 Agreement was invalid; and (3) whether, despite the language of MCL 117.9(6) and MCL 123.1012(3) (providing a two-year waiting period before resubmission of a petition for annexation), the doctrine of collateral estoppel applied to invalidate the SBC's 2014 approval of the appellee property owner's petition for annexation on the basis of the SBC's denial of the same property owner's petition in 2012.

We further order that this case be argued and submitted to the Court together with the case of *TeriDee LLC v Haring Charter Twp* (Docket No. 153008), at such future session of the Court as both cases are ready for submission. In light of the joint submission, the time allotted for oral argument shall be limited to fifteen minutes per side

in each case. MCR 7.314(B)(1). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800) only and served on the parties in both cases.

TERIDEE LLC v HARING CHARTER TOWNSHIP, No. 153008; Court of Appeals No. 324022. Leave to appeal granted 499 Mich 896.

On order of the Court, this Court's April 6, 2016 order is amended, to correct a clerical error, and reads as follows:

On order of the Court, the application for leave to appeal the December 8, 2015 judgment of the Court of Appeals is considered, and it is granted. The parties shall include among the issues to be briefed: (1) whether *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241 (2004), applies to the defendant townships' Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425); (2) if so, whether the challenged provisions of the Act 425 Agreement were nevertheless authorized by Section 6(c) of Act 425, MCL 124.26(c); and (3) if the challenged provisions are void, whether the offending provisions of the defendant townships' Act 425 Agreement were severable.

The Michigan Townships Association and the Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

We further order that this case be argued and submitted to the Court together with the case of *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800), at such future session of the Court as both cases are ready for submission. In light of the joint submission, the time allotted for oral argument shall be limited to fifteen minutes per side in each case. MCR 7.314(B)(1). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs* (Docket No. 151800) only and served on the parties in both cases.

Summary Disposition June 10, 2016:

BLACK v SHAFER, No. 149516; Court of Appeals No. 312379. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we reverse the March 25, 2014 judgment of the Court of Appeals, and we reinstate the June 8, 2012 order of the Wayne Circuit Court granting summary disposition in favor of defendant Anthony Shafer. "To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340 (2000). Assuming that the defendant owed the plaintiff a legal duty and

that duty was breached, the plaintiff's claim fails as a matter of law because the plaintiff cannot establish that any such breach constituted a proximate cause of the plaintiff's injuries.

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86 (2004). This Court has defined "proximate cause" as "that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred." *McMillian v Vilet*, 422 Mich 570, 576 (1985). "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.' " *Id*. If reasonable minds could not differ regarding the proximate cause of a plaintiff's injury, courts should decide the issue as a matter of law. *Farmer v Christensen*, 229 Mich App 417, 424 (1998).

In the instant case, the defendant's conduct pertaining to the shotgun did not constitute a proximate cause of the plaintiff's injury, as Ian Gearhart's subsequent actions in picking up the shotgun again after he returned to the garage, cycling a shell in the chamber of the shotgun, and pulling the trigger constituted an intervening cause of the plaintiff's injury, which broke the chain of causation and relieved the defendant of any liability. Gearhart's intervening conduct with regard to the shotgun was not reasonably foreseeable. Thus, because reasonable minds could not differ that the plaintiff cannot establish causation under the specific circumstances of this case, her claim fails as a matter of law. In light of this disposition, we decline to address the remaining issues presented in our order granting leave to appeal.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 10, 2016:

CASTRO v GOULET, No. 152383; reported below: 312 Mich App 1. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the filing of a motion for an extension of time to file an affidavit of merit, which is subsequently granted, is sufficient to toll the statute of limitations. The parties should not submit mere restatements of their application papers.

SMITH v CITY OF FLINT, No. 152844; reported below: 313 Mich App 141. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether: (1) the Court of Appeals erred in applying *Peña Ingham Co Rd Comm*, 255 Mich App 299 (2003), a Michigan Civil Rights Act case, to the plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.; (2) the plaintiff alleged sufficient facts to establish that he suffered an adverse employment action under the WPA, see MCL 15.362; and (3) the plaintiff alleged sufficient facts to establish that he engaged in a protected activity under the WPA, see MCL 15.362. The parties should not submit mere restatements of their application papers.

PEOPLE v FREDERICK and PEOPLE v VAN DOORNE, Nos. 153115 and 153117; reported below: 313 Mich App 457. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the knock-and-talk procedures employed by the law enforcement officers violated the general public's implied license to approach the defendants' residences and constituted unconstitutional searches in violation of the Fourth Amendment, see *Florida v Jardines*, 569 US ___; 133 S Ct 1409, 1416 n 3, 1422; 185 L Ed 2d 495 (2013); (2) whether the conduct of the law enforcement officers "objectively reveals a purpose to conduct a search" to obtain evidence without the necessity of obtaining a warrant, *id*. at 1417; and (3) whether the conduct of the law enforcement officers was coercive, see *United States v Spotted Elk*, 548 F3d 641, 655 (CA 8, 2008). The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in these cases may move the Court for permission to file briefs amicus curiae.

Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *People v Frederick* (Docket No. 153115) only and served on the parties in both cases.

Leave to Appeal Denied June 10, 2016:

In re SOLTYS ESTATE, No. 151299; Court of Appeals No. 311143.

ZAHRA, J. (*dissenting*). I would peremptorily reverse the judgment of the Court of Appeals and remand this case to the St. Clair County Probate Court for entry of a judgment in defendant's favor because the lower courts improperly applied the statutory presumption of ownership in the survivor of joint accounts set forth in MCL 487.703.

This case involves a dispute between siblings regarding the division of certain assets of their deceased mother's estate. Leo and Dolores Soltys had three children, Kathleen Schmidlin, Marlene Harris, and Dennis Soltys. Leo and Dolores made Kathleen, defendant's decedent,[1] a joint account holder on various financial accounts beginning in 1992, and she remained a joint account holder with Dolores after Leo's death in 2004. When Dolores died in 2007, Kathleen claimed the accounts to the exclusion of Marlene and Dennis, later adding defendant as a joint account holder. In 2009, Marlene and Dennis filed the instant lawsuit against Kathleen, seeking an equitable distribution of Dolores's estate assets, including the funds in the joint accounts. Defendant responded by alleging that Dolores had intended to pass the joint accounts to Kathleen only, relying on MCL 487.703, which creates a statutory

[1] Kathleen died during these proceedings. Her estate, with her husband, David Schmidlin, as personal representative, was substituted as defendant.

presumption of ownership in the survivor of a joint account absent evidence of fraud or undue influence.[2]

After a bench trial, the probate court provided 17 factual findings in support of its conclusion that the two siblings had rebutted the statutory presumption created by MCL 487.703. The court thus ordered the joint accounts distributed equally among the parties.

Defendant appealed in the Court of Appeals. The panel found clear error in five of the probate court's findings of fact, but affirmed the court's judgment in favor of plaintiffs.[3] Defendant filed an application for leave to appeal with this Court, and the Court issued a peremptory order that remanded the case to the Court of Appeals for application of the proper standard of review.[4] On remand, the Court of Appeals again affirmed the probate court's judgment for plaintiffs.[5] Defendant again seeks leave to appeal in this Court.

The presumption created by MCL 487.703 is one of ownership and not intention.[6] This Court has made clear that the mere fact that a person placed funds in a joint account is itself "cardinal" evidence that the depositor intended the funds to become jointly owned by the account holders and pass to the survivor upon the other holder's death.[7] In order to rebut this cardinal evidence of the depositor's intent, a party must present "[r]easonably clear and persuasive proof" that the deposits were not intended to become the property of the surviving account holder.[8]

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[2] Joint accounts are governed by MCL 487.703, which provides in relevant part:

> When a deposit has been made . . . in the names of 2 or more persons, payable to either or the survivor or survivors, such deposit or any part thereof . . . made by any 1 of the said persons, shall become the property of such persons as joint tenants, . . . and may be paid to any 1 of said persons during the lifetime of said persons or to the survivor or survivors after the death of 1 of them . . . .
>
> The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence . . . of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

[3] *In re Soltys Estate*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2014 (Docket No. 311143).

[4] *In re Soltys Estate*, 497 Mich 908 (2014).

[5] *In re Soltys Estate (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2015 (Docket No. 311143).

[6] *Jacques v Jacques*, 352 Mich 127, 136-137 (1958).

[7] *Id.* at 137.

[8] *Lau v Lau*, 304 Mich 218, 224 (1943).

On remand, the Court of Appeals identified the following facts as "pertinent" to its conclusion that plaintiffs had provided reasonably clear and persuasive proof to rebut the statutory presumption of MCL 487.703:

> (1) Dennis and Marlene both testified that their parents always told them that all of the children would be treated equally; (2) the inclusion of Kathleen's name on the accounts was initially done at a time when no disharmony existed in the family; (3) Dolores had indicated that she "trusted" Kathleen and, in conjunction with this statement, indicated that Leo had wanted joint accounts in order to avoid probate; (4) defendant testified that Kathleen had told Marlene that there would be an equitable distribution of Dolores's property; (5) Kathleen had been less than forthcoming about the accounts, had lacked credibility in certain other respects, and had told Marlene that she "maybe" would get half of the real estate even though Kathleen "was a signatory to deeds conveying essentially all of Dolores's real estate to herself and Marlene;" (6) defendant testified that he believed that Kathleen had not spent any money from the accounts "because it was Dolores's money;" and (7) Kathleen made statements indicating hesitation regarding whether she was meant to receive all the money from the accounts. [9]

These factual findings that the Court of Appeals relied on are either ambiguous or irrelevant with respect to determining Dolores's intent and, in my view, do not constitute reasonably clear and persuasive proof that Dolores did not intend the joint accounts to become the property of Kathleen only.

As for factual finding (1), Dolores's statement that all her children would be treated equally does not necessarily indicate that she wanted her assets divided evenly, especially because those statements did not specifically pertain to her intent in creating the joint accounts.[10] While the lower courts relied on inferences and speculation from Dolores's statements, the fact that Dolores disinherited Dennis from her will shortly before her death is direct evidence that she did not intend that her assets be divided equally.

As for factual finding (2), the absence or existence of family harmony at the time the joint accounts were created is irrelevant in ascertaining Dolores's intent, particularly given that the accounts were maintained during times of both family harmony and disharmony. What is relevant is the unambiguous testimony from Dolores's attorney that Dolores

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[9] *Soltys Estate (On Remand)*, unpub op at 4.

[10] See *Lau*, 304 Mich at 221-223 (holding that the decedent's statements during his lifetime that his estate would be evenly divided among his four children were insufficient to overcome the statutory presumption that ownership of the decedent's joint accounts went to the survivor).

understood "how joint accounts worked." Dolores thus understood that Kathleen would be entitled to sole ownership of the accounts and did nothing to change this, even in the periods of familial disharmony.

As for factual finding (3), it is pure conjecture that Dolores's statement that she "trusted" Kathleen meant that she trusted Kathleen to divide the accounts equally. While Leo may have stated that he did not want *his* estate probated, it is Dolores's intent that is relevant. In any event, a joint account is simply one way by which a party can avoid probate. The record demonstrates that Dolores understood how the joint accounts would operate upon her death. Dolores could have placed all three of her children on the accounts and still avoided probate, but she chose not to do so. A desire to avoid probate therefore says nothing at all about Dolores's intention to distribute money to the other two children.

As for factual finding (4), whatever promises *Kathleen* might have made to Marlene about the funds in the accounts in no way evidences *Dolores's* intent about how the joint accounts should be distributed.

As for factual finding (5), Kathleen's alleged lack of credibility or dishonesty regarding the accounts is irrelevant to Dolores's intent in creating the joint accounts, especially given that any dishonesty or manipulation occurred after the accounts were formed. Quite simply, even if Kathleen had been willing to subvert Dolores's intent, that willingness would not constitute evidence of Dolores's intent when she placed only Kathleen on the joint accounts.

Finally, as for factual findings (6) and (7), Kathleen's belief regarding to whom the money belonged or hesitation in spending the funds in no way provides evidence of Dolores's intent regarding any of her assets.[11] The Court of Appeals confused the knowledge or actions of the survivor with the intent of the accounts' creator.

In sum, I conclude that the evidentiary record in this case in no way supports a determination that reasonably clear and persuasive evidence was presented to overcome the statutory presumption of ownership in the survivor. While the lower courts relied on indirect assumptions and inferences regarding Dolores's intent, the fact that Dolores placed only Kathleen on the joint accounts is strong *direct* evidence of her intent that Kathleen alone possess the assets of those accounts, especially considering the unambiguous testimony of Dolores's attorney that Dolores understood how joint accounts operate. The vague statements made by Dolores about wanting to divide her property equally carry little weight, especially in light of her clear intent to disinherit Dennis by writing him out of her will less than two months before her death. Plaintiffs insist that Dolores intended to "treat" their children equally, but plaintiffs fail to appreciate that "fair treatment" does not necessarily require an equal distribution of the joint accounts.

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[11] See *Anderson v Lewis*, 342 Mich 53, 60 (1955) (stating that a person's mistaken belief about her rights in the joint account before and after the death of the decedent "cannot change the legal status of the joint account").

By relying on speculative evidence to conclude that Dolores intended the accounts to be shared equally, the lower courts failed to give proper deference to the presumption created by MCL 487.703 and the evidentiary standard of reasonably clear and persuasive proof. This is troubling, because if the statutory presumption in MCL 487.703 can be so easily overcome, the presumption is rendered meaningless, erasing the security and certainty of the rights of a surviving account holder. Indeed, the presumption would be overcome in most disputes in which feuding siblings disagree about the intent of their parents, even if the parents might have placed funds in joint accounts precisely to avoid such disputes.

For these reasons, I agree with defendant that plaintiffs did not provide reasonably clear and persuasive proof to rebut the statutory presumption of ownership set forth in MCL 487.703, and I would therefore peremptorily reverse the judgment of the Court of Appeals and remand this case to the St. Clair County Probate Court for entry of a judgment in favor of the defendant regarding these accounts.

MARKMAN, J., joined the statement of ZAHRA, J.

Application for Leave to Appeal Dismissed on Stipulation June 10, 2016:

DELL v CITIZENS INSURANCE COMPANY OF AMERICA, No. 152747; reported below: 312 Mich App 734.

Reconsideration Denied June 10, 2016:

In re STURGIS, No. 152905; Court of Appeals No. 324127. Leave to appeal denied 499 Mich 862.

Leave to Appeal Denied June 15, 2016:

GINN v BROWN, No. 153840; Court of Appeals No. 331745.

Leave to Appeal Denied June 17, 2016:

PEOPLE v DELAGARZA, No. 152827; Court of Appeals No. 329372.

MARKMAN, J. (*dissenting*). Defendant pleaded guilty to charges of second-degree murder and conspiracy to commit murder. At the plea hearing, the prosecutor explained that "even though [the conspiracy charge] would be a conspiracy to commit murder in the first degree, it would be [sentenced using] the second degree murder grid [of the sentencing guidelines]." The trial court informed defendant that the conspiracy charge "carr[ied] a penalty of up to life in prison" and stated at sentencing that "by virtue of the plea agreement, . . . conviction will enter on the less serious charge of conspiracy to commit second degree murder." Similarly, the judgment of sentence lists the offense as conspiracy to commit second-degree murder. The sentence was to concur-

rent prison terms of 20 to 40 years. Defendant now has moved to withdraw his conspiracy plea on the basis that he pleaded guilty of conspiracy to commit second-degree murder, which is a nonexistent crime. The trial court denied this motion without significant analysis, suggesting that any error was not prejudicial, and the Court of Appeals denied leave to appeal.

There are two issues in this case, each implicating the trial court's authority to impose a particular sentence for the conspiracy plea. The first is whether, as defendant contends, the sentence is invalid because he was formally sentenced to a nonexistent conspiracy crime. As the Court of Appeals has recognized, a "conspiracy to commit second-degree murder is not a criminal offense," and therefore a trial court abuses its discretion when it fails to grant a defendant's motion to withdraw a plea of guilty to such a nonexistent offense. *People v Hammond*, 187 Mich App 105, 109-113 (1991). I find it compelling here that the formal judgment of sentence states that defendant entered a guilty plea to conspiracy to commit second-degree murder, citing the second-degree murder statute, MCL 750.317; this also reflects the trial court's express statements at sentencing. As such, I believe defendant has a valid argument that he was sentenced to a nonexistent crime.

The second issue is whether, even assuming the validity of the criminal offense, the trial court lacked the authority to impose the term-of-years sentence given that conspiracy to commit first-degree murder carries a mandatory sentence of life imprisonment. MCL 750.157a(a) provides that a person convicted of conspiracy "*shall* be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit . . . ." (Emphasis added.) Consequently, the punishment for conspiracy to commit first-degree murder is the same as the punishment for first-degree murder: "[A] person who commits any of the following [acts] is guilty of first-degree murder and shall be punished by imprisonment for life . . . ." MCL 750.316(1). Thus, a sentence to a term-of-years for this crime would violate the statutorily prescribed penalty. We have held that "[a] sentence is invalid when it is beyond statutory limits . . . ." *People v Miles*, 454 Mich 90, 96 (1997). Because the instant sentence fell below the mandatory minimum, the trial court disregarded the legislatively prescribed limitation on its sentencing discretion and consequently lacked the authority to impose this sentence.

I would remand this case to the Court of Appeals for consideration of both issues and would further reject for the following reasons the trial court's suggestion that the asserted lack of prejudice to defendant renders remand unnecessary. First, each of the errors described implicates the inherent authority of the trial court to impose the sentence it did. We have opined that "[a] sentence may be invalid *no matter whom the error benefits* because sentencing must not only be tailored to each defendant, but [must] also satisfy 'society's need for protection and its interest in maximizing the offender's rehabilitative potential.' " *Id*. at 98 (citation omitted; emphasis added). Second, any lack of prejudice to defendant stands alongside prejudice to the legislative process and thus to the people of this state. The Legislature, and not the judiciary,

possesses the power to set criminal penalties. *People v Hegwood*, 465 Mich 432, 436 (2001). Therefore, when a trial court disregards these penalties, it imposes criminal punishments that the Legislature has rejected. Third, I would observe that defendant himself evidently feels aggrieved by his sentence, despite having been expressly informed at the withdrawal-motion hearing that the prosecutor would reinstate the first-degree murder charges with their accompanying mandatory sentences of life imprisonment and having fully acknowledged his understanding of this risk.

Finally, I believe that the issues raised here are of considerable jurisprudential significance because they concern the trial court's encroachment on the Legislature's prerogative to define criminal penalties. Such disregard of mandatory sentences results in the effective nullification of the Legislature's sentencing scheme. This is because a mandatory minimum sentence is clearly designed by the Legislature to operate as a *limitation* on the trial court's sentencing discretion. Once more, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *Id*. Permitting trial courts to treat these mandates as mere suggestions can only undermine our penal code. I would remand this case to the Court of Appeals for consideration of these issues and, by this dissent, call this case to the attention of the Legislature.

VIVIANO and BERNSTEIN, JJ., joined the statement of MARKMAN, J.

In re HUBBARD, No. 153748; Court of Appeals No. 328872.

Summary Disposition Entered June 22, 2016:

PEOPLE v ROTHWELL, No. 153113; Court of Appeals No. 328890. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v DAVID LYONS, No. 153125; Court of Appeals No. 319252. On order of the Court, the motion for immediate consideration is granted. The motion to supplement the application for leave to appeal is denied. The application for leave to appeal the October 22, 2015 judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand for resentencing is granted, in part, and we remand this case to the Macomb Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resen-

tence the defendant. The motion for peremptory reversal, the motions to remand, and the motion for reissuance of the judgment are denied. We do not retain jurisdiction.

PEOPLE v VAYKO, No. 153245; Court of Appeals No. 330579. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Washtenaw Circuit Court's imposition of probation-supervision fees and remand this case to that court for further proceedings. On remand, in addition to the relief ordered by the Court of Appeals, the circuit court shall amend the presentence report to correct the statutory citation for the defendant's conviction offense. The presentence report currently reflects that the defendant was convicted pursuant to MCL 750.520e(1)(a), but the defendant was convicted under MCL 750.520e(1)(b). The circuit court shall forward a copy of the amended presentence report to the Department of Corrections. Furthermore, the circuit court shall impose probation-supervision fees in accordance with MCL 771.3c. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 22, 2016:

PEOPLE v CRAWFORD, No. 152752; Court of Appeals No. 319998. The parties shall file supplemental briefs within 42 days of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing whether the failure to administer any oath to the jury following jury selection, but before the beginning of the trial, amounts to plain error requiring reversal. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied June 22, 2016:

PEOPLE v WERSHE, No. 152544; Court of Appeals No. 329110.

MARKMAN, J., did not participate as the result of matters arising from his past service as United States Attorney.

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 152745; Court of Appeals No. 323136.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals erred by concluding that material issues of fact remained in support of plaintiff's claim of fraudulent inducement and therefore reversing the trial court's grant of summary disposition in favor of defendant. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 165-172 (2006); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 502-507 (1998).

PEOPLE v LANNING, No. 152757; Court of Appeals No. 322362.

PEOPLE v RAPIER, No. 152767; Court of Appeals No. 329282.

PEOPLE v ATEN, No. 152814; Court of Appeals No. 329324.

PEOPLE v BREWCZYNSKI, No. 152819; Court of Appeals No. 322674.

PEOPLE v WOOTEN, No. 152868; Court of Appeals No. 321600.

PEOPLE v GREENE, No. 152959; Court of Appeals No. 322874.

Reconsideration Granted June 22, 2016:

PEOPLE v ROBERTS, No. 151660; Court of Appeals No. 325545. On order of the Court, the motion for reconsideration of this Court's March 8, 2016 order is considered, and it is granted. We vacate our order dated March 8, 2016. On reconsideration, the application for leave to appeal the April 8, 2015 order of the Court of Appeals is considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Leave to Appeal Denied June 23, 2016:

DELANEY v BOARD OF STATE CANVASSERS, No. 153973; Court of Appeals No. 333410.

Summary Disposition June 24, 2016:

MADSON v JASO, No. 153729; Court of Appeals No. 331605. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for further consideration. On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012). We do not retain jurisdiction.

Leave to Appeal Denied June 24, 2016:

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES v DEPARTMENT OF TREASURY, Nos. 152588, 152598-152610, 152613, 152615-152648, and 152650; reported below: 312 Mich App 394.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Because the issues raised here are, in my judgment, of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state, I believe they ought to be heard by the highest court of this state and would thus grant leave to appeal.

In 1970, Michigan joined the Multistate Tax Compact (the Compact) when the Legislature enacted MCL 205.581. See 1969 PA 243, effective July 1, 1970. Article III(1) of the Compact provided that certain multistate taxpayers may elect to apportion income to Michigan for tax purposes "in the manner provided by the laws of such state," i.e., the laws of Michigan, or else "in accordance with Article IV." MCL 205.581, art III(1). Article IV provided for an apportionment formula based on property, payroll, and sales factors. MCL 205.581, art IV(9). Effective January 1, 2008, the Legislature enacted the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., 2007 PA 36, which provided that "each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). Finally, MCL 208.1301(2) of the BTA provided for an apportionment formula based solely on a sales factor.

At issue in *IBM v Dep't of Treasury*, 496 Mich 642 (2014), was whether the plaintiff multistate taxpayer could elect to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes or whether, as the defendant Department of Treasury argued, it was required to use the BTA's sales-factor-only apportionment formula. This Court ruled in *IBM* that the taxpayer could elect to use the Compact's apportionment formula. The lead opinion stated that "the Legislature had [not] repealed the Compact's election provision by implication when it enacted the BTA," *id*. at 645 (opinion by VIVIANO, J.), while the concurring opinion left that question open, *id*. at 668 (ZAHRA, J., concurring). In response, the Legislature enacted 2014 PA 282, which repealed the Compact "retroactively and effective beginning January 1, 2008." 2014 PA 282, enacting § 1. As a consequence, 2014 PA 282 retroactively repealed the Compact election provision beginning that date as well. Several multistate taxpayers challenged the constitutionality of 2014 PA 282, but the Court of Claims and the Court of Appeals upheld the statute against those challenges. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 401 (2015). In my judgment, the following four constitutional questions that are raised in the taxpayers' various applications for leave to appeal warrant thorough consideration by this Court by a grant of leave to appeal:

First, is 2014 PA 282 consistent with federal due-process protections, US Const, Ams V and XIV, given that the retroactivity period here of six years and nine months arguably exceeds "a modest period of retroactivity," *United States v Carlton*, 512 US 26, 32 (1994), and that one justice has observed in this same regard in a frequently cited statement that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions," *id*. at 38 (O'Connor, J., concurring in the judgment)?

Second, is 2014 PA 282 consistent with the Michigan Due Process Clause, Const 1963, art 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7 (1984), because "while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution," *People v Victor*, 287 Mich 506, 514 (1939)?

Third, does 2014 PA 282 violate either the federal or state prohibitions against the impairment of contracts, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of that contract, see *Gillette Co v Franchise Tax Bd*, 62 Cal 4th 468, 477-479 (2015)?

Fourth, does 2014 PA 282 violate the Separation of Powers Clause, Const 1963, art 3, § 2, because by prescribing the outcomes of those cases that were held in abeyance pending *IBM*, as well as *IBM* itself, the Legislature has impinged on the judicial power, Const 1963, art 6, § 1, and contravened the principle that "the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered," *People ex rel Sutherland v Governor*, 29 Mich 320, 325-326 (1874); cf. *Plaut v Spendthrift Farm, Inc*, 514 US 211, 217-218 (1995) ("Congress has exceeded its authority by requiring the federal courts to exercise '[t]he judicial Power of the United States,' U. S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.")?

As the United States Supreme Court has recognized, "[T]he power to tax involves the power to destroy[.]" *M 'Culloch v Maryland*, 17 US (4 Wheat) 316, 431 (1819). This power must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago. While I do not yet have any firm belief regarding the constitutionality of 2014 PA 282, I do have a firm belief that before retroactive tax burdens such as those set forth in this law are imposed, the arguments of affected taxpayers deserve consideration by the highest court of this state. Accordingly, I respectfully dissent and would grant leave to appeal.

VIVIANO, J., joined the statement of MARKMAN, J.

In re KREMER/MCBEE, No. 153789; Court of Appeals No. 328664.

AIELLO V SABAUGH, No. 153982; Court of Appeals No. 333461.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Summary Disposition June 28, 2016:

PEOPLE V YOWCHUANG, No. 150148; Court of Appeals No. 314706. By order of November 26, 2014, the application for leave to appeal the

August 5, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Seewald* (Docket No. 150146). On order of the Court, the case having been decided on April 25, 2016, 499 Mich 111 (2016), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to reinstate the bindover decision of the 16th District Court and for further proceedings consistent with this Court's opinion in *People v Seewald*.

PEOPLE V BUTLER-JACKSON, No. 151255; reported below: 307 Mich App 667. By order of May 27, 2015, the application for leave to appeal the November 6, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Hartwick* (Docket No. 148444). On order of the Court, the case having been decided on July 27, 2015, 498 Mich 192 (2015), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the propriety of court costs under MCL 771.3(5). Though probation supervision costs and reimbursement of expenses incurred in prosecuting the defendant or providing her with legal assistance are authorized under that statute, court costs are not. See *People v Cunningham*, 496 Mich 145 (2014), and *People v Juntikka*, 310 Mich App 306 (2015). We remand this case to the Macomb Circuit Court for further proceedings. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V LAMAR HAYWOOD, No. 152168; Court of Appeals No. 326349. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction, and we remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

PEOPLE V PRINCE, No. 152200; Court of Appeals No. 327540. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Alcona Circuit Court's award of restitution in the amount of $1,332.47, and we remand this case to the circuit court for reconsideration of the amount of restitution to be ordered in light of *People v McKinley*, 496 Mich 410 (2014). We do not retain jurisdiction.

PEOPLE V RENTSCH, No. 152857; Court of Appeals No. 321934. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of

our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V BRISTOL, No. 152862; Court of Appeals No. 322285. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V DONTE THOMAS, No. 152918; Court of Appeals No. 320405. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V RIGGINS, No. 152987; Court of Appeals No. 329911. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the judgment of sentence. The trial court improperly ordered both the defendant's sentences for assault with intent to commit great bodily harm, MCL 750.84, and carrying a concealed weapon, MCL 750.227, to be consecutive to his sentence for felony-firearm, MCL 750.227b. On remand, the trial court shall impose only the sentence for assault with intent to commit great bodily harm to be consecutive to the felony-firearm sentence, and shall order concurrent sentences for the defendant's convictions of carrying a concealed weapon and felony-firearm. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v STEPHENS, No. 153044; Court of Appeals No. 322721. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Van Buren Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

HENRY v DOW CHEMICAL COMPANY, No. 153093; Court of Appeals No. 328716. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v HOLDER, No. 153306; Court of Appeals No. 330680. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

PEOPLE v AKERSON, No. 153308; Court of Appeals No. 329306. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Cass Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

Leave to Appeal Denied June 28, 2016:

PEOPLE v BUTLER-JACKSON, No. 150721; reported below: 307 Mich App 667.

PEOPLE v BURNS, No. 150895; Court of Appeals No. 323983.

PEOPLE v MOFFIT, No. 151044; Court of Appeals No. 323872.

PEOPLE v CISTRUNK, No. 151069; Court of Appeals No. 322827.

PEOPLE v TERRANCE DAWSON, No. 151132; Court of Appeals No. 323801.

PEOPLE v MYERS, No. 151254; Court of Appeals No. 318599.

PEOPLE v AARON ROBINSON, No. 151264; Court of Appeals No. 319226.

PEOPLE v GRIFFIN, No. 151298; Court of Appeals No. 324718.

PEOPLE v MORNINGSTAR, No. 151426; Court of Appeals No. 324896.

PEOPLE v LEMONS, No. 151553; Court of Appeals No. 324136.

PEOPLE v EUGENE SMITH, No. 151644; Court of Appeals No. 325461.

PEOPLE v RUNYON, No. 151766; Court of Appeals No. 318966.

PEOPLE v MILES, No. 151815; Court of Appeals No. 325826.

VIVIANO, J., did not participate due to a familial relationship with prior counsel of record in this case.

PEOPLE v WILFORD, No. 151881; Court of Appeals No. 325817.

PEOPLE v KEITH HENDERSON, No. 151894; Court of Appeals No. 326626.

PEOPLE v NORRIS, No. 151955; Court of Appeals No. 321185.

PEOPLE v NEWSOME, No. 151957; Court of Appeals No. 326786.

PEOPLE v RUNYON, No. 151968; Court of Appeals No. 320647.

PEOPLE v EFREM WILSON, No. 151976; Court of Appeals No. 326612.

PEOPLE v MERITHEW, No. 151982; Court of Appeals No. 326764.

PEOPLE v JAMES HOBBS, No. 151996; Court of Appeals No. 326652.

SCHMITZ v BERTETTO, No. 152029; Court of Appeals No. 324929.

PEOPLE v MORAN, No. 152051; Court of Appeals No. 327192.

PEOPLE v KNAJDEK, Nos. 152054, 152055, and 152056; Court of Appeals Nos. 325688, 325689, and 325690.

PERRY v GLENN M-D COTTON, No. 152061; Court of Appeals No. 322069.

PEOPLE v GLEASON, No. 152068; Court of Appeals No. 328021.

PEOPLE v HARDEN, No. 152106; Court of Appeals No. 326768.

PEOPLE v DENTON, No. 152116; Court of Appeals No. 326707.

PEOPLE v SETTY, No. 152154; Court of Appeals No. 327075.

PEOPLE v FREDERICK MARTIN, No. 152182; Court of Appeals No. 325070.

PEOPLE v DIAZ, No. 152189; Court of Appeals No. 327283.

PEOPLE v WELLONS, No. 152193; Court of Appeals No. 326790.

PEOPLE v WATTS, No. 152243; Court of Appeals No. 314132.

STATE TREASURER v ALTMAN, No. 152249; Court of Appeals No. 321809.

PEOPLE v SOLIVAN, No. 152279; Court of Appeals No. 328266.

PEOPLE v TROTTER, No. 152304; Court of Appeals No. 327847.

PEOPLE v DARYL CAIN, No. 152323; Court of Appeals No. 328676.

PEOPLE v LARUE, No. 152331; Court of Appeals No. 328096.

PEOPLE v JOHN SMITH, No. 152343; Court of Appeals No. 321099.

PEOPLE v EMERY, No. 152350; Court of Appeals No. 327499.

PEOPLE v RODRIGUEZ, No. 152378; Court of Appeals No. 328405.

PEOPLE v HENRY SIMPSON, No. 152384; Court of Appeals No. 326617.

PEOPLE v GARVIN, No. 152388; Court of Appeals No. 328480.

PEOPLE v DESHAWN REED, No. 152397; Court of Appeals No. 327098.

PEOPLE v BURNSIDE, No. 152410; Court of Appeals No. 328495.

PEOPLE v ABERNATHY, No. 152416; Court of Appeals No. 327523.

PEOPLE v LIFER, No. 152428; Court of Appeals No. 328249.

PEOPLE v WILLIE CHAPPELL, No. 152452; Court of Appeals No. 327478.

PEOPLE v DAVIES, No. 152457; Court of Appeals No. 328811.

PEOPLE v SNOW, No. 152460; Court of Appeals No. 327876.

PEOPLE v MCGOWAN, No. 152465; Court of Appeals No. 328353.

PEOPLE v CHARLES CLARK, No. 152466; Court of Appeals No. 328166.

PEOPLE v GWINN, No. 152472; Court of Appeals No. 327774.

PEOPLE v DEANGELO JONES, No. 152495; Court of Appeals No. 328288.

PEOPLE v DAVID POWELL, No. 152499; Court of Appeals No. 328393.

PEOPLE v BROOKS, No. 152530; Court of Appeals No. 326879.

PEOPLE v JACOBSON, No. 152543; Court of Appeals No. 327939.

PEOPLE v DARRON CHATMAN, No. 152576; Court of Appeals No. 318085.

MCALLISTER v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 152684; Court of Appeals No. 328270.

MOQUIN v FLINT CHILDREN'S CENTER, PC, No. 152714; Court of Appeals No. 319801.

MOQUIN v FLINT CHILDREN'S CENTER, PC, No. 152716; Court of Appeals No. 319801.

JOHNSON CONTROLS, INC v ATLANTIC AUTOMOTIVE COMPONENTS, LLC, No. 152717; Court of Appeals No. 321172.

PEOPLE v ANTHONY WILLIAMS, No. 152750; Court of Appeals No. 328905.

PEOPLE v JOSHUA BROWN, No. 152763; Court of Appeals No. 320408.

MATO v CITY OF LIVONIA, No. 152794; Court of Appeals No. 323071.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

PEOPLE v CHANNELLS, No. 152811; Court of Appeals No. 321333.

PEOPLE v GRZELAK, No. 152813; Court of Appeals No. 323208.

PEOPLE v DEQUAUN HALL, No. 152818; Court of Appeals No. 321755.

PEOPLE v FRANK TURNER, No. 152823; Court of Appeals No. 320895.

PEOPLE v TREVOR MANNING, No. 152829; Court of Appeals No. 329196.

PEOPLE v HENRY SMITH, No. 152836; Court of Appeals No. 322745.

PEOPLE v LAICH, No. 152839; Court of Appeals No. 324622.

PEOPLE v BRIAN TURNER, No. 152846; Court of Appeals No. 329805.

PEOPLE v HALLIBURTON, No. 152847; Court of Appeals No. 322607.

TRUCHAN v CHARTER TOWNSHIP OF ADRIAN and TRUCHAN v GERMOND, Nos. 152851 and 152852; Court of Appeals Nos. 323624 and 323655.

PEOPLE v WOMACK, No. 152859; Court of Appeals No. 327638.

BAILEY v GREAT LAKES MUTUAL INSURANCE COMPANY, No. 152878; Court of Appeals No. 321655.

PEOPLE v TINA MARTIN, No. 152881; Court of Appeals No. 322220.

WILLIAMS v JERVISS-FETHKE INSURANCE AGENCY, No. 152882; Court of Appeals No. 323434.

PEOPLE v ANTHONY WASHINGTON, No. 152901; Court of Appeals No. 328700.

COPPOLA v MANNING, No. 152908; Court of Appeals No. 323994.

PEOPLE v MONTGOMERY, No. 152909; Court of Appeals No. 319393.

THE CINCINNATI INSURANCE COMPANY v VEMULAPALLI, No. 152910; Court of Appeals No. 322840.

BACON v ZAPPIA, No. 152911; Court of Appeals No. 323570.

In re THOMAS, No. 152915; Court of Appeals No. 330007.

MILLER v BABU, No. 152919; Court of Appeals No. 322947.

BACON v ZAPPIA, No. 152920; Court of Appeals No. 323570.

PEOPLE v LOWE, No. 152923; Court of Appeals No. 329784.

PEOPLE v DEMARKO SANDERS, No. 152937; Court of Appeals No. 322712.

PEOPLE v BENNETT, No. 152944; Court of Appeals No. 328098.

HARDENBERGH v COUNTY OF MANISTEE, No. 152945; Court of Appeals No. 322605.

PEOPLE v O'CONNELL, No. 152949; Court of Appeals No. 321939.

PEOPLE v HARRISON, No. 152958; Court of Appeals No. 324355.

PEOPLE v ARELLANO, No. 152963; Court of Appeals No. 322886.

PEOPLE v CASTLE, No. 152964; Court of Appeals No. 323254.

PEOPLE v BEY, No. 152978; Court of Appeals No. 322609.

PEOPLE v BOYKINS, No. 152984; Court of Appeals No. 322308.

PEOPLE v HANNA, No. 152989; Court of Appeals No. 320268.

PEOPLE v DAVEON HENRY, No. 152992; Court of Appeals No. 325853.

PEOPLE v PAYNE, No. 152993; Court of Appeals No. 320327.

KOZLOFF v GUILIANI, No. 152997; Court of Appeals No. 327452.

PEOPLE v KEITH WILLIAMS, No. 152999; Court of Appeals No. 320406.

KOZLOFF v GUILIANI, No. 153001; Court of Appeals No. 327401.

BORMUTH v GRAND RIVER ENVIRONMENTAL ACTION TEAM, No. 153007; Court of Appeals No. 321865.

PEOPLE v JOHNNY TAYLOR, No. 153010; Court of Appeals No. 322629.

PEOPLE v JASON MILLER, No. 153011; Court of Appeals No. 320502.

PEOPLE v SAMUEL DAVIS, No. 153017; Court of Appeals No. 329280.

ZELASKO v ZELASKO, No. 153022; Court of Appeals No. 324514.

YPSILANTI FIRE MARSHALL v KIRCHER, No. 153028; Court of Appeals No. 324810.

PEOPLE v SASSIN, No. 153030; Court of Appeals No. 329473.

PEOPLE v COPE, No. 153032; Court of Appeals No. 321697.

PEOPLE v RONALD SEABROOKS, No. 153036; Court of Appeals No. 320320.

PEOPLE v SCHMIDT, No. 153051; Court of Appeals No. 330023.

TAYLOR v SPECTRUM HEALTH PRIMARY CARE PARTNERS, No. 153055; Court of Appeals No. 323155.

PEOPLE v LLOYD, No. 153060; Court of Appeals No. 323108.

PEOPLE v HATCH, No. 153061; Court of Appeals No. 322893.

SMITH v BRONSON LIFESTYLE IMPROVEMENT & RESEARCH CENTER CO, No. 153070; Court of Appeals No. 321813.

PEOPLE v BRANDON GLENN, No. 153079; Court of Appeals No. 323236.

PEOPLE v COWAN, No. 153083; Court of Appeals No. 321937.

PEOPLE v THREATS, No. 153090; Court of Appeals No. 323097.

In re AWAD ESTATE, No. 153091; Court of Appeals No. 323163.

MOTOR CITY PAWN BROKERS, INC v CITY OF WARREN, No. 153094; Court of Appeals No. 322459.

PEOPLE v DEMAUN BUTLER, No. 153106; Court of Appeals No. 322690.

PEOPLE v TOWNSEND, No. 153120; Court of Appeals No. 322880.

PEOPLE v CHAMBERS, No. 153121; Court of Appeals No. 323024.

PEOPLE v BEAN, No. 153124; Court of Appeals No. 323406.

PEOPLE v GARNER, No. 153133; Court of Appeals No. 330001.

PEOPLE v REGINALD BROWN, No. 153134; Court of Appeals No. 314712.

PEOPLE v ERIC THOMAS, No. 153135; Court of Appeals No. 330047.

PEOPLE v RUSSELL, No. 153136; Court of Appeals No. 323158.

PEOPLE v JAMES COLEMAN, No. 153139; Court of Appeals No. 320844.

PEOPLE v PAGAN, No. 153149; Court of Appeals No. 329649.

PEOPLE v BRADLEY, No. 153170; Court of Appeals No. 330219.

PEOPLE v MATHIS, No. 153171; Court of Appeals No. 323821.

PEOPLE v DONALD CHATMAN, No. 153176; Court of Appeals No. 329803.

PEOPLE v KEENAN WATKINS, No. 153180; Court of Appeals No. 330067.

PEOPLE v VENTURA, No. 153183; Court of Appeals No. 330386.

PEOPLE v ZACHARKO, No. 153184; Court of Appeals No. 322221.

PEOPLE v LUCAS, No. 153195; Court of Appeals No. 330318.

PEOPLE v VENTURA, No. 153198; Court of Appeals No. 330384.

PEOPLE v VENTURA, No. 153200; Court of Appeals No. 330387.

PEOPLE v DONTEAU DENNIS, No. 153206; Court of Appeals No. 323181.

PEOPLE v GARDNER, No. 153208; Court of Appeals No. 323883.

PEOPLE v KALIB BROCK, No. 153212; Court of Appeals No. 330259.

PEOPLE v WALKER, No. 153214; Court of Appeals No. 330175.

PEOPLE v ROBERT FOSTER, No. 153228; Court of Appeals No. 330443.

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION v AUTO CLUB INSURANCE ASSOCIATION, No. 153231; Court of Appeals No. 324132.

PEOPLE v BRANDON CAIN, No. 153239; Court of Appeals No. 314342.

PEOPLE v FILES, No. 153240; Court of Appeals No. 321336.

PEOPLE v CRUMLEY, No. 153241; Court of Appeals No. 329590.

PEOPLE v MCKINLEY, No. 153259; Court of Appeals No. 330316.

PEOPLE v GILKEY, No. 153260; Court of Appeals No. 323507.

PEOPLE v MCCULLOUGH, No. 153261; Court of Appeals No. 329979.

PEOPLE v TARVER, No. 153262; Court of Appeals No. 330131.

PEOPLE v LINCOLN, No. 153282; Court of Appeals No. 328226.

PEOPLE v MORRIS FOSTER, No. 153298; Court of Appeals No. 329569.

PEOPLE v EPPES, No. 153310; Court of Appeals No. 330401.

PEOPLE v TAWAIN WILLIAMS, No. 153314; Court of Appeals No. 330683.

PEOPLE v RYAN ROGERS, No. 153319; Court of Appeals No. 330422.

PEOPLE v RHONE, No. 153327; Court of Appeals No. 323466.

PEOPLE v FULGHAM, No. 153328; Court of Appeals No. 323281.

PEOPLE v JEREMY BROWN, No. 153329; Court of Appeals No. 314341.

PEOPLE v KENDRICK LEE, No. 153333; Court of Appeals No. 330815.

PEOPLE v LOPEZ, No. 153337; Court of Appeals No. 330913.

PEOPLE v MACK, No. 153436; Court of Appeals No. 330830.

PEOPLE v LANGBEIN, No. 153535; Court of Appeals No. 330322.

Reconsideration Granted June 28, 2016:

PEOPLE v LUNSFORD, No. 152089; Court of Appeals No. 327464. On order of the Court, the motion for reconsideration of this Court's March 8, 2016 order is considered, and it is granted. We vacate our order dated March 8, 2016. On reconsideration, the application for leave to appeal the June 24, 2015 order of the Court of Appeals is considered, and,

pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional restraint on its discretion, it may affirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional restraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Reconsideration Denied June 28, 2016:

PEOPLE v OLSON, No. 150135; Court of Appeals No. 321882. Leave to appeal denied at 499 Mich 880.

BLACKWARD PROPERTIES, LLC v SOWER, No. 151112; Court of Appeals No. 313282. Leave to appeal denied at 499 Mich 868.

PEOPLE v LOWN, No. 151227; Court of Appeals No. 322796. Leave to appeal denied at 499 Mich 868.

PEOPLE v HARRIS, No. 151290; Court of Appeals No. 325503. Leave to appeal denied at 499 Mich 880.

In re APPLICATION OF DETROIT EDISON COMPANY TO IMPLEMENT OPT OUT PROGRAM, No. 151635; Court of Appeals No. 316781. Leave to appeal denied at 499 Mich 868.

PEOPLE v PUTMAN, No. 151662; Court of Appeals No. 325096. Leave to appeal denied at 499 Mich 868.

PEOPLE v EALY, No. 151708; Court of Appeals No. 326015. Leave to appeal denied at 499 Mich 881.

ROTH v ROTH, No. 151728; Court of Appeals No. 324180. Leave to appeal denied at 499 Mich 868.

PEOPLE v NELSON, No. 151895; Court of Appeals No. 318607. Leave to appeal denied at 499 Mich 869.

WHITE v MATTHEWS, No. 151927; Court of Appeals No. 320174. Leave to appeal denied at 498 Mich 921.

ALEXANDER v ATTORNEY GRIEVANCE COMMISSION, No. 151929. Superintending control denied at 498 Mich 923.

ROTH v ROTH, No. 152071; Court of Appeals No. 326164. Leave to appeal denied at 499 Mich 869.

PEOPLE v ZAHRAIE, No. 152212; Court of Appeals No. 321835. Summary disposition at 499 Mich 866.

REID v HURLEY MEDICAL CENTER, No. 152215; Court of Appeals No. 324883. Leave to appeal denied at 499 Mich 869.

PEOPLE v EVANS, No. 152228; Court of Appeals No. 321909. Leave to appeal denied at 499 Mich 875.

PEOPLE v FULTON, No. 152236; Court of Appeals No. 325830. Leave to appeal denied at 499 Mich 869.

CITY OF GRAND RAPIDS v STRICKLAND, No. 152242; Court of Appeals No. 327467. Leave to appeal denied at 499 Mich 952.

KUBACKI v TRAN, No. 152267; Court of Appeals No. 319821. Leave to appeal denied at 499 Mich 898.

PEOPLE v OVERBEEK, No. 152290; Court of Appeals No. 319951. Leave to appeal denied at 499 Mich 870.

DEBOER v STRICKLAND, No. 152401; Court of Appeals No. 327867. Leave to appeal denied at 498 Mich 952.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 152437. Superintending control denied at 499 Mich 885.

In re TOCARCHICK, No. 152569; Court of Appeals No. 328970. Leave to appeal denied at 499 Mich 883.

REID v ATTORNEY GRIEVANCE COMMISSION, No. 152649. Superintending control denied at 499 Mich 885.

JONES v MANVILLE, No. 152678; Court of Appeals No. 324263. Leave to appeal denied at 499 Mich 873.

PEOPLE v JONES, No. 152730; Court of Appeals No. 328730. Leave to appeal denied at 499 Mich 871.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 152797. Superintending control denied at 499 Mich 885.

PEOPLE v RAISBECK, No. 152828; reported below: 312 Mich App 759. Leave to appeal denied 499 Mich 871.

Summary Disposition June 29, 2016:

GRAVES v KMART CORPORATION, No. 153833; Court of Appeals No. 332184. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 29, 2016:

In re MARDIGIAN ESTATE, No. 152655; reported below: 312 Mich App 538. The parties shall file supplemental briefs within 42 days of the

date of this order addressing, among other issues, whether this Court should overrule *In re Powers Estate*, 375 Mich 150 (1965). The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 1, 2016:

EMPLOYERS MUTUAL CASUALTY COMPANY v HELICON ASSOCIATES, INC, No. 152994; reported below: 313 Mich App 401. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the consent judgment amounts to a "judgment or adjudication . . . based on a *determination*" of the insured's conduct [emphasis added]; and, if so, (2) whether it was "a determination that acts of fraud or dishonesty were committed by the 'insured.' " The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 1, 2016:

SEJASMI INDUSTRIES, INC v A+ MOLD, INC, No. 153625; Court of Appeals No. 328292.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 153953; Court of Appeals No. 333210.

Reconsideration Denied July 1, 2016:

PEOPLE v URIBE, No. 151899; reported below: 310 Mich App 467. Summary disposition at 499 Mich 921.

Summary Disposition July 8, 2016:

PEOPLE v HALE, No. 153332; Court of Appeals No. 322144. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

Leave to Appeal Granted July 8, 2016:

In re RASMER ESTATE, Nos. 153356, 153370, 153371, 153372, and 153373; reported below: 314 Mich App 281. The parties shall address whether and to what extent: (1) MCL 400.112g-k permit the plaintiff to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate-recovery program from the plaintiff; (2) estate recovery for such pre-notification services constitutes a violation of the individual's substantive and/or procedural due process rights; and (3) a challenge to the plaintiff's estate-recovery efforts under MCL 400.112g(4) is subject to judicial review. The total time allowed for oral argument shall be 60 minutes: 30 minutes for the plaintiff, followed by 30 minutes for the defendants. MCR 7.314(B).

Leave to Appeal Denied July 8, 2016:

GREER V ADVANTAGE HEALTH, No. 149494; reported below: 305 Mich App 192. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of December 10, 2014. The application for leave to appeal the May 13, 2014 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

ZAHRA, J. (*concurring*). I concur in the majority's conclusion that leave to appeal was improvidently granted in this case. I write separately to bring this case to the attention of the Legislature. To the extent the Legislature did not intend MCL 600.6303(4) to exclude from the statutory collateral-source rule anything greater than the actual amount of a contractual lien exercised by a lienholder, it needs to amend the statute to expressly state its intent.

" '[T]he common-law collateral-source rule provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources.' "[1] The rule was first recognized in 1854, at about the same time the theory of liability based on fault was established.[2] Under the common-law rule, an injured person was allowed to retain the proceeds of insurance paid

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[1] *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58 (1990), quoting *Tebo v Havlik*, 418 Mich 350, 366 (1984) (opinion by BRICKLEY, J.); see also *Motts v Mich Cab Co*, 274 Mich 437, 443-446 (1936).

[2] See *Propeller Monticello v Mollison*, 58 US (17 How) 152, 155 (1854) (often credited as the first case applying the common-law collateral-source rule); Comment, *The Collateral Source Rule: Double Recovery and Indifference to Societal Interests in the Law of Tort Damages*, 2 U Puget Sound L Rev 197, 198-199 (1978) (noting *Propeller Monticello* as the first United States case recognizing the collateral-source rule).

to him or her as a policyholder and recover a second time from a tortfeasor.[3] The justifications underlying the common-law rule included its punishment objective and deterrent effect in tort law.[4]

In 1986, the Legislature abrogated the common-law collateral-source rule for tort claims when it enacted MCL 600.6303 (the statutory collateral-source rule) as part of a wave of comprehensive tort reforms.[5] In contrast to the common-law rule, the statute allows for the reduction

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[3] *Tebo*, 418 Mich at 366 (opinion by BRICKLEY, J.). See also Senate Select Committee on Civil Justice Reform, *A Report on Civil Justice in Michigan* (presented to the Michigan Senate on September 26, 1985, in fulfillment of Senate Resolution No. 204).

[4] See 4 Restatement Torts, 2d, § 901(c), p 451 (stating that one of the purposes of tort damages is to "punish wrongdoers and deter wrongful conduct"). See also *Perrott v Shearer*, 17 Mich 48, 55-56 (1868); *Gypsum Carrier, Inc v Handelsman*, 307 F2d 525, 534 (CA 9, 1962).

[5] MCL 600.6303 provides in relevant part:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.
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> (4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the

of a plaintiff's award for past economic damages by payments from collateral sources after a verdict has been rendered. The legislative intent in enacting the statutory collateral-source rule was "to prevent personal injury plaintiffs from being compensated twice for the same injury."[6] Given this legislative purpose, it seems counterintuitive that the Legislature would enact the statute with a loophole that permits a plaintiff to recover for medical expenses never owed or paid.

In this case, the Court of Appeals determined that the negotiated insurance discounts, which reduced the amount of the medical expenses that plaintiffs would otherwise have been responsible to pay, are " '*benefits received or receivable* from an insurance policy' and, therefore, a 'collateral source' within the meaning of the first sentence of MCL 600.6303(4)."[7] The Court of Appeals further determined that "the insurance discounts are also '*benefits paid or payable*' within the plain and ordinary meaning of the last sentence of [MCL 600.6303(4)]."[8] The Court then held that under the terms of the exclusion from the statutory collateral-source rule stated in MCL 600.6303(4), when a contractual lien is exercised, as was the case here by defendants, the exclusion "applies to all benefits that were paid or payable" by the entity entitled to the lien.[9]

This result is at odds with my understanding of the purpose of the collateral-source statute. As is evident from the Court of Appeals' opinion, the Legislature did not expressly limit its exclusion from the collateral-source rule to the amount actually paid for medical services by the lienholder. The Court of Appeals' opinion will ultimately authorize some amount of recovery for medical expenses never incurred by injured plaintiffs. The Legislature may have assumed that the statutory exclu-

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proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

[6] *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 301 (1996). See also *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1072 (2007) (statement by YOUNG, J., concurring).

[7] *Greer v Advantage Health*, 305 Mich App 192, 210 (2014) (emphasis added).

[8] *Id*. at 211 (emphasis added).

[9] *Id*. at 213. The Court of Appeals held that "both the cash payments and discount, i.e., the 'benefits received or receivable from an insurance policy,' are excluded as statutory collateral source benefits." *Id*. at 212. The Court noted that the Legislature did not "write the statute to say that the [MCL 600.6303(4)] collateral source exclusion is limited to the 'amount of' a validly exercised lien." *Id*. The Court concluded that when a contractual lien is exercised, the exclusion from the statutory collateral-source rule of MCL 600.6303(4) is not limited to the amount of the lien, but rather applies to all benefits that were "paid or payable" and "received or receivable from an insurance policy." *Id*. at 212-213.

sion from the collateral-source rule for contractual liens would be limited to the actual amount paid for full satisfaction of medical care. Perhaps the Legislature did not anticipate that payment of a discounted amount that fully satisfied the amount due for medical care would bring within the collateral-source exclusion the healthcare providers' original asking price for the medical care provided. To the extent that the Legislature did not intend to allow a windfall recovery of the retail price for medical services that were provided at a discount, the statute needs to be amended.

YOUNG, C.J., and MARKMAN, J., joined the statement of ZAHRA, J.

In re NORGREN/ODNEAL/BLANKS, No. 153851; Court of Appeals No. 329171.

In re SMART, No. 153884; Court of Appeals No. 329413.

In re SMART, No. 153886; Court of Appeals No. 329414.

Leave to Appeal Denied July 15, 2016:

In re GORDON, No. 153963; Court of Appeals No. 328343.

Summary Disposition July 20, 2016:

OZIMEK V RODGERS, No. 153836; Court of Appeals No. 331726. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to the Court of Appeals for further consideration. On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012). We do not retain jurisdiction.

Order Entered July 20, 2016:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249, No. 154085. On order of the Court, the request by the Governor for an advisory opinion on the constitutionality of Section 152b contained in 2016 PA 249 is considered. We invite the Governor and any member of the House or Senate to file briefs on the following

questions: (1) whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion in this matter; and (2) whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const 1963, art 8, § 2.

We respectfully request the Attorney General to submit separate briefs arguing both sides of the above questions. Other persons or groups interested in the determination of the questions presented in this matter may move the Court for permission to file briefs amicus curiae on either or both sides of the above questions.

All briefs shall be filed no later than August 26, 2016.

The request by the Governor for an advisory opinion remains pending.

Rehearing Denied July 20, 2016:

ALTOBELLI v HARTMANN, No. 150656; opinion at 499 Mich 284.

Summary Disposition July 26, 2016:

PEOPLE v DEMARAY, No. 148841; Court of Appeals No. 319352. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Emmet Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. On remand, the Emmet Circuit Court shall also consider the defendant's issue regarding the assessment of a payment to the "Victims Restitution Fund." We do not retain jurisdiction.

PEOPLE v WILKINS, No. 149522; Court of Appeals No. 320581. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Montcalm Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. We do not retain jurisdiction.

PEOPLE v JONES, No. 150092; Court of Appeals No. 322748. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. We do not retain jurisdiction.

PEOPLE v QUIJAS, No. 150515; Court of Appeals No. 323426. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court for consideration of the defendant's issue regarding the assessment of court costs.

PEOPLE v TIGHE, No. 150530; Court of Appeals No. 323558. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Cass Circuit Court for reconsideration of the defendant's issue regarding the assessment of court costs. The motions to amend, for "summary of judgment," for bond pending appeal, and for immediate consideration are denied.

PEOPLE v KILBURN, No. 150581; Court of Appeals No. 323978. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Ionia Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In addition, we vacate the trial court's November 21, 2014 order reinstating costs. The court did not have authority to sua sponte enter the order because the correction was not a clerical error under MCR 6.435(A), the judgment of sentence was not invalid within the meaning of MCR 6.429(A), and the amended version of MCL 769.1k does not apply to the court's amended judgment of sentence issued September 29, 2014. We do not retain jurisdiction.

PEOPLE v JAMISON, No. 150715; Court of Appeals No. 323391. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Bay Circuit Court, and we remand this case to the trial court for resentencing. The court erred in assigning points for Offense Variables 9 and 19 (OV 9 and OV 19), MCL 777.39 and MCL 777.49, respectively, which changed the defendant's guidelines range. *People v Kimble*, 470 Mich 305 (2004).

PEOPLE v AGUILAR, No. 150854; Court of Appeals No. 317215. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kalamazoo Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. We do not retain jurisdiction.

PEOPLE v SHANTEL SMITH, No. 150913; Court of Appeals No. 323964. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kalamazoo Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have

imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

PEOPLE v GOODENOUGH, No. 151005; Court of Appeals No. 324303. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Cass Circuit Court for consideration of the defendant's issue regarding the assessment of court costs.

PEOPLE v GARRISON, No. 151552; Court of Appeals No. 324628. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court for consideration of the defendant's issues regarding *People v Cunningham*, 496 Mich 145 (2014), and MCL 769.1k (as amended effective October 17, 2014) as to the assessment of court costs. We do not retain jurisdiction.

PEOPLE v FIELDS, No. 152737; Court of Appeals No. 328948. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the defendant's first-degree murder conviction and remand this case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. See *Miller v Alabama,* 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). We do not retain jurisdiction.

PEOPLE v CRAWFORD, No. 152752; Court of Appeals No. 319998. By order dated June 22, 2016, this Court directed the Clerk to schedule oral argument on whether to grant the application or take other action and ordered the parties to file supplemental briefs. On order of the Court, the plaintiff-appellee's motion for reconsideration of this Court's June 22, 2016 order is considered, and it is granted in part. We vacate our order of June 22, 2016. On reconsideration, the application for leave to appeal the October 13, 2015 judgment of the Court of Appeals is considered. The original transcript of proceedings on November 26, 2013, does not reflect any oath being administered to the jury in this case. An amended transcript of proceedings on November 26, 2013, indicates that an oath was, in fact, administered to the jury prior to the taking of testimony. Because this information was known to the Court of Appeals panel before its opinion was issued, but the opinion describes the transcript as not showing that a jury oath was administered, we remand this case to the same panel for further consideration of the defendant's contention that the jury was not sworn and for an explanation why it failed to consider the amended transcript in concluding that no oath was administered. We do not retain jurisdiction.

PEOPLE v CHAMPINE, No. 153105; Court of Appeals No. 323018. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Clare Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of

our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

HOOKS v FERGUSON, No. 153193; Court of Appeals No. 322872. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Elher v Misra*, 499 Mich 11 (2016).

PEOPLE v ODOM, No. 153355; Court of Appeals No. 330012. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 26, 2016:

In re HICKS/BROWN, No. 153786; Court of Appeals No. 328870. The parties shall file supplemental briefs within 35 days of the date of this order addressing: (1) whether the respondent-mother made a timely request for accommodation of her disability in the service plan prepared by the Department of Health and Human Services; (2) whether the Department of Health and Human Services made "reasonable efforts to reunify the child and family," as required by MCL 712A.19a(2), given the respondent-mother's disability; and (3) whether the failure to provide a service plan that accommodates a respondent's disability may be grounds for reversal of a termination of parental rights on appeal, under either the Americans with Disabilities Act or under the Probate Code, MCL 712A.19a(2), where there is no determination that the trial court erred in finding grounds for termination under MCL 712A.19b(3) or that termination was in the best interests of the children under MCL 712A.19b(5). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 26, 2016:

PEOPLE v FRANK, No. 150507; Court of Appeals No. 322218.

PEOPLE v KEETH, No. 150747; Court of Appeals No. 317971.

PILGRIM'S REST BAPTIST CHURCH v PEARSON, No. 151680; reported below: 310 Mich App 318.

PEOPLE v DAVID JONES, No. 151772; Court of Appeals No. 325040.

PEOPLE v BEALS, No. 151783; Court of Appeals No. 326254.

PEOPLE v HUBBARD, No. 151806; Court of Appeals No. 326995.

PEOPLE v DEJONGE, No. 151945; Court of Appeals No. 325933.

PEOPLE v FOSTER, No. 152141; Court of Appeals No. 326767.

PEOPLE v BELTOWSKI, No. 152158; Court of Appeals No. 326192.

PEOPLE v AKINS, No. 152161; Court of Appeals No. 326119.

PEOPLE v WITBRODT, No. 152231; Court of Appeals No. 326074.

CITY OF EAST LANSING v DES LAURIERS, No. 152262; Court of Appeals No. 325177.

PEOPLE v JAMAL BROWN, No. 152282; Court of Appeals No. 327551.

PEOPLE v PLANT, No. 152288; Court of Appeals No. 328040.

PEOPLE v HUDSON, No. 152358; Court of Appeals No. 325668.

PEOPLE v EDWARD MOORE, No. 152417; Court of Appeals No. 328196.

PEOPLE v VERNON BROWN, No. 152423; Court of Appeals No. 326992.

PEOPLE v BIRD, No. 152473; Court of Appeals No. 327432.

PEOPLE v LILLY, No. 152475; Court of Appeals No. 327475.

PEOPLE v BOWER, No. 152496; Court of Appeals No. 328311.

PEOPLE v JOHNSTON, No. 152501; Court of Appeals No. 328284.

PEOPLE v CALDWELL, No. 152532; Court of Appeals No. 328200.

PEOPLE v RANDALL, No. 152541; Court of Appeals No. 327190.

PEOPLE v STEVENSON, No. 152548; Court of Appeals No. 328084.

PEOPLE v TIPPINS, No. 152555; Court of Appeals No. 329328.

PEOPLE v EVANS-FIELD, No. 152573; Court of Appeals No. 328199.

PEOPLE v GARLAND HALL, No. 152582; Court of Appeals No. 329246.

PEOPLE v LEWIS, No. 152662; Court of Appeals No. 328472.

PEOPLE v TRAXLER, No. 152672; Court of Appeals No. 328442.

PEOPLE v ARTHUR JONES, No. 152703; Court of Appeals No. 328164.

PEOPLE v GANT, No. 152707; Court of Appeals No. 328315.

PEOPLE v TIETZ, No. 152708; Court of Appeals No. 326812.

PEOPLE v BOSTON, No. 152720; Court of Appeals No. 328850.

PEOPLE v SOLES, No. 152731; Court of Appeals No. 327020.

PEOPLE v WELLS, No. 152733; Court of Appeals No. 327598.

PEOPLE v RADFORD, No. 152736; Court of Appeals No. 327362.

PEOPLE v COOLEY, No. 152738; Court of Appeals No. 328747.

PEOPLE v SEARCY, No. 152749; Court of Appeals No. 327968.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR 2012 RECONCILIATION, No. 152762; Court of Appeals No. 321877. On order of the Court, the application for leave to appeal the October 22, 2015 judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. See *In re Application of Consumers Energy Company for Reconciliation of 2009 Costs,* 499 Mich 885 (2016).

LARSEN, J. I dissent for the reasons stated in my dissenting statement in *In re Consumers Energy*, 499 Mich 885 (2016).

VIVIANO, J., joined the statement of LARSEN, J.

PEOPLE v GORDON, No. 152764; Court of Appeals No. 328469.

PEOPLE v MCBURNEY, No. 152766; Court of Appeals No. 329247.

PEOPLE v HAGGER, No. 152799; Court of Appeals No. 322311.

PEOPLE v TAYLOR, No. 152884; Court of Appeals No. 327553.

ADAS v WILLIAM BEAUMONT HOSPITAL, No. 152907; Court of Appeals No. 318397.

PEOPLE v ROYSTER, No. 152932; Court of Appeals No. 322979.

PEOPLE v DARRIUS BROWN, No. 152962; Court of Appeals No. 322995.

PEOPLE v REYNOLDS, No. 152966; Court of Appeals No. 322680.

PEOPLE v BREZZELL, No. 152968; Court of Appeals No. 322978.

PEOPLE v PERKINS, No. 152970; Court of Appeals No. 322593.

PEOPLE v ROBERTSON, No. 152971; Court of Appeals No. 322882.

PEOPLE v AUSTIN, No. 152972; Court of Appeals No. 323400.

PEOPLE v IVORY, No. 152985; Court of Appeals No. 329788. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for consideration of the defendant's issue regarding the assessment of court costs.

LANGLEY v RUBERT, No. 153002; Court of Appeals No. 322918.

PEOPLE v GINNS, No. 153024; Court of Appeals No. 329609.

OSPREY SA LTD v WEBBER INVESTMENT COMPANY, LLC, No. 153048; Court of Appeals No. 324001.

PEOPLE v HARVEY, No. 153073; Court of Appeals No. 319482.

METCALF v MACKINAC COUNTY ROAD COMMISSION, No. 153114; Court of Appeals No. 322940.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

PEOPLE v BOYCE, No. 153122; Court of Appeals No. 318859.

PEOPLE v HOLWERDA, No. 153123; Court of Appeals No. 323100.

BARR v HALL, No. 153132; Court of Appeals No. 322684.

PEOPLE v MCKAY, No. 153143; Court of Appeals No. 323519.

PEOPLE v MAGWOOD, No. 153161; Court of Appeals No. 323033.

PEOPLE v CONWELL, No. 153178; Court of Appeals No. 323084.

PEOPLE v WALKER, No. 153197; Court of Appeals No. 322133.

PEOPLE v THOMAS, No. 153199; Court of Appeals No. 323888.

PEOPLE v SLEEPER, No. 153205; Court of Appeals No. 323860.

SHAVERS v DEPARTMENT OF CORRECTIONS, No. 153220; Court of Appeals No. 329820.

PEOPLE v MCCONNELL, No. 153225; Court of Appeals No. 323800.

PEOPLE v HAYNES, No. 153232; Court of Appeals No. 329793.

PEOPLE v BRAGGS, No. 153233; Court of Appeals No. 323274.

PEOPLE v CUTLER, No. 153235; Court of Appeals No. 329859.

BUTKOVICH v WAL-MART STORES, INC, No. 153237; Court of Appeals No. 328464.

INDIAN VILLAGE MARKET, LLC v MEREM, No. 153280; Court of Appeals No. 323649.

PEOPLE v TOBLER, No. 153283; Court of Appeals No. 330638.

PEOPLE v WEST, No. 153285; Court of Appeals No. 322557.

PEOPLE v EVANS, No. 153287; Court of Appeals No. 322319.

PEOPLE v EVANS, No. 153289; Court of Appeals No. 322321.

PEOPLE v BUCHINO, No. 153312; Court of Appeals No. 323692.

PEOPLE v HOLLEY, No. 153330; Court of Appeals No. 323606.

PEOPLE v DISMUKE, No. 153335; Court of Appeals No. 323678.

BUTLER v DEPARTMENT OF CORRECTIONS, No. 153343; Court of Appeals No. 330042.

PEOPLE v GINN, No. 153349; Court of Appeals No. 324284.

PEOPLE v QUIGLEY, No. 153354; Court of Appeals No. 322482.

In re ATTORNEY SANCTIONS (PEOPLE v LONGACRE), No. 153358; Court of Appeals No. 329513.

PEOPLE v HERNANDEZ, No. 153364; Court of Appeals No. 330398.

PEOPLE v DAY, No. 153369; Court of Appeals No. 331045.

PEOPLE v COTTON, No. 153379; Court of Appeals No. 330509.

PEOPLE v VANCE, No. 153382; Court of Appeals No. 323408.

PEOPLE v DOYLE, No. 153386; Court of Appeals No. 329736.

PEOPLE v SANDERS, No. 153388; Court of Appeals No. 330792.

PEOPLE v KAYCEE SMITH, No. 153389; Court of Appeals No. 322752.

PEOPLE v PATRICK JONES, No. 153391; Court of Appeals No. 328909.

PEOPLE v HORNE, No. 153394; Court of Appeals No. 330188.

PEOPLE v GATHRIGHT, No. 153395; Court of Appeals No. 323315.

PEOPLE v MARSH, No. 153402; Court of Appeals No. 323709.

PEOPLE v HOLT, No. 153405; Court of Appeals No. 324268.

PEOPLE v HARVEY DAVIS, No. 153409; Court of Appeals No. 330108.

BELLAIRE FAMILY AND COSMETIC DENTISTRY, PC v AYLWORTH, No. 153415; Court of Appeals No. 324016.

PEOPLE v RICKERD, No. 153418; Court of Appeals No. 330749.

PEOPLE v GRESHAM, No. 153423; Court of Appeals No. 331105.

PEOPLE v ALLEN, No. 153424; Court of Appeals No. 324443.

PEOPLE v GOLEY, No. 153425; Court of Appeals No. 330268.

PEOPLE v WILLIS, No. 153426; Court of Appeals No. 324617.

PEOPLE v KEY, No. 153427; Court of Appeals No. 324076.

PEOPLE v JULIAN TENEYUQUE, No. 153430; Court of Appeals No. 323232.

PEOPLE v AMBER SMITH, No. 153432; Court of Appeals No. 325061.

PEOPLE v HARRIS, No. 153434; Court of Appeals No. 330726.

PEOPLE v QUAGLIATA, No. 153443; Court of Appeals No. 331162.

PEOPLE v DENTON, No. 153444; Court of Appeals No. 325204.

PEOPLE v RYE, No. 153445; Court of Appeals No. 323703.

PEOPLE v SEARS, No. 153454; Court of Appeals No. 324082.

PEOPLE v ANESTACIO TENEYUQUE, No. 153455; Court of Appeals No. 323224.

PEOPLE v GIBBONS, No. 153459; Court of Appeals No. 330909.

PEOPLE v LUCAJ, No. 153460; Court of Appeals No. 331129.

PEOPLE v TAJICK JACKSON, No. 153462; Court of Appeals No. 331213.

PEOPLE v FEEK, No. 153475; Court of Appeals No. 331100.

PEOPLE v WATERS, No. 153478; Court of Appeals No. 331071.

PEOPLE v KEON DAVIS, No. 153484; Court of Appeals No. 319483.

PEOPLE v HENKE, No. 153487; Court of Appeals No. 324358.

PEOPLE v NICHOLAS JACKSON, No. 153493; Court of Appeals No. 330958.

PEOPLE v LOVE, No. 153494; Court of Appeals No. 324542.

PEOPLE v JEMEAL HALL, No. 153510; Court of Appeals No. 330542.

PEOPLE v CLARENCE MOORE, No. 153559; Court of Appeals No. 329700.

PEOPLE v THORNTON, No. 153714; Court of Appeals No. 327669.

BONOMO v KANAKRY, No. 153750; Court of Appeals No. 331739.

PEOPLE v WRIGHT, No. 153809; Court of Appeals No. 329023.

DEBOER v STRICKLAND, No. 153843; Court of Appeals No. 329765.

Reconsideration Denied July 26, 2016:

PEOPLE v MOSHER, No. 151971; Court of Appeals No. 320444. Leave to appeal denied at 499 Mich 914.

SHEPARD v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 152574; Court of Appeals No. 327857. Leave to appeal denied at 499 Mich 915.

PEOPLE v TISDALE, No. 152580; Court of Appeals No. 327135. Leave to appeal denied at 499 Mich 915.

PEOPLE v LIMON, No. 152693; Court of Appeals No. 328701. Leave to appeal denied at 499 Mich 916.

PEOPLE v DEAN, No. 152869; Court of Appeals No. 328705. Leave to appeal denied at 499 Mich 928.

THE VICTOR FIRM, PLLC v FROLING, No. 152885; Court of Appeals No. 327504. Leave to appeal denied at 499 Mich 899.

HARVEY-BEY v CENTRAL MICHIGAN CORRECTIONAL FACILITY WARDEN, No. 152892; Court of Appeals No. 328904. Leave to appeal denied at 499 Mich 917.

PEOPLE v MCCRORY, No. 152961; Court of Appeals No. 311205. Leave to appeal denied at 499 Mich 929.

PEOPLE v CLAYTON, No. 153063; Court of Appeals No. 329878. Leave to appeal denied at 499 Mich 920.

PEOPLE v NELSON, No. 153217; Court of Appeals No. 323685. Leave to appeal denied at 499 Mich 917.

PEOPLE v GODBOLDO, No. 153323; Court of Appeals No. 323261. Leave to appeal denied at 499 Mich 930.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 29, 2016:

RAY v SWAGER, No. 152723; Court of Appeals No. 322766. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether a reasonable jury could determine that the defendant's conduct was "the proximate cause" of plaintiff Kersch Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries. MCL 691.1407(2)(c); *Robinson v Detroit*, 462 Mich 439, 462 (2000); *Beals v Michigan*, 497 Mich 363 (2015). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 29, 2016:

PEOPLE v RADANDT, No. 150906; Court of Appeals No. 314337. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of July 1, 2015. The application for leave to appeal the December 2, 2014 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the majority's determination that leave to appeal was improvidently granted in this case. The analysis of the Court of Appeals majority is flawed in several critical ways, and this Court has yet to provide guidance to the lower courts on the framework for analyzing a "knock and talk" procedure since the United States Supreme Court's opinion in *Florida v Jardines*, 569 US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013). I would prefer to issue an opinion correcting the errors made by the Court of Appeals majority and clarifying the proper framework for such an analysis. I write to elaborate on my views.

I. FACTS AND PROCEDURAL HISTORY

In August 2011, St. Joseph County police officers received an anonymous tip that marijuana was being grown at the address of the defendant, Michael Radandt. Deputies Michael McCoy and Jeremiah Abnet visited the property. The defendant's house is in a rural area, with the front of the house facing the road to the west, the back of the house

facing east, and a dirt or gravel driveway along the north side of the house. The driveway extends past the back of the house and leads to a barn. There are two doors on the north side of the house. The door closest to the road leads into an enclosed porch on the front of the house. The second door, the "middle door," abuts the driveway. There is a low wooden deck attached to the back of the house and a sliding glass door (the "back door") that leads onto the deck. On their August 2011 visit, the officers found no one at home and did not find evidence sufficient to provide probable cause for a search warrant.

In December 2011, the officers received another anonymous tip complaining of high traffic at the defendant's residence. As a result, Deputies McCoy and Abnet visited the property again. They pulled into the driveway, parked adjacent to the middle door, and knocked on that door. When no one answered, they walked east toward the backyard and around the corner of the house. There was a well-worn path through the grass leading to the back door. Deputy McCoy walked onto the deck and knocked on the back door. Standing in front of the back door, Deputy McCoy saw that the second-floor windows were covered with black plastic sheeting, observed a makeshift vent fan blowing air out of a second-floor window, and smelled marijuana. No one responded to the knock at the back door, and the officers left without making contact with any residents. The officers obtained a search warrant based on what they had observed while standing at the defendant's back door. Upon executing the search warrant, the officers discovered evidence of a marijuana grow operation.

The defendant was charged with manufacturing 20 to 200 marijuana plants, possessing a firearm during the commission of a felony, and maintaining a drug house. The defendant filed a motion to suppress the evidence found as a result of the executed search warrant, arguing that the police had developed probable cause for the warrant only after unlawfully entering the defendant's curtilage, and the trial court denied the motion. The defendant entered a conditional plea on December 28, 2012, and was granted a stay of sentence pending appeal.

On remand from this Court, the Court of Appeals affirmed the trial court's denial of the defendant's motion to suppress. The majority held that the officers were lawfully present in the defendant's backyard as part of their effort to make contact with someone in the home. *People v Radandt*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2014 (Docket No. 314337), p 4. Judge SHAPIRO dissented, concluding that the officers had exceeded the scope of a permissible "knock and talk" because they did not have an implied license to enter the defendant's backyard. *Id*. at 2 (SHAPIRO, J., dissenting). This Court granted the defendant's application for leave to appeal.

II. ANALYSIS

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." US Const, Am IV. Likewise, the Michigan Constitution provides that "[t]he

person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." Const 1963, art 1, § 11. This Court construes the Michigan Constitution "to provide the same protection as that secured by the Fourth Amendment, absent compelling reason to impose a different interpretation." *People v Slaughter*, 489 Mich 302, 311 (2011) (quotation marks and citation omitted). "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v New York*, 445 US 573, 586 (1980) (quotation marks and citation omitted). When evidence is found within the curtilage of a home, "both the Fourth Amendment's and Michigan's constitutional prohibition[s] against unreasonable searches and seizures are applicable." *People v Custer*, 465 Mich 319, 326 n 2 (2001).

A. CURTILAGE

The Court of Appeals majority erred when it determined that the defendant's backyard was not part of the curtilage of his home. See *People v Radandt*, unpub op at 4. The area "immediately surrounding and associated with the home"—the "curtilage"—is "considered part of the home itself for Fourth Amendment purposes." *Oliver v United States*, 466 US 170, 180 (1984). When determining whether a particular area is part of the curtilage of a home, the primary consideration is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v Dunn*, 480 US 294, 301 (1987). Courts consider four factors—the *Dunn* factors—when making this determination: "[1] the proximity of the area . . . to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *Id*. at 301.

In this case, the area at issue is the part of the defendant's backyard immediately adjacent to his home, including the wooden deck affixed to the back of his home. This area is in immediate proximity to the home. The back door where the officers stood opens directly into the defendant's home. In *Jardines*, the Supreme Court described "the front porch" as "the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.' " *Jardines*, 569 US at ___; 133 S Ct at 1415, quoting *Oliver*, 466 US at 182 n 12. Like the front porch, the immediate backyard and back deck are classic examples of areas to which the activity of home life extends. They are "intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v Ciraolo*, 476 US 207, 213 (1986). They are commonly used for activities closely associated with the home, such as grilling and eating. While the area at issue in this case was not enclosed and the defendant had not taken other steps to protect it from observation by passersby, the area was not visible from the road and further privacy-enhancing steps were not necessary given the rural location of the home. And, contrary to the Court of Appeals majority's statement, "the fact that there was an observable path leading from the main entry to the rear sliding glass door" is not relevant to the question

whether this area was curtilage. *Radandt*, unpub op at 4. The defendant's backyard where the officers walked and the back deck where they stood were certainly part of the defendant's curtilage.

B. SCOPE OF IMPLIED LICENSE

The Court of Appeals majority next held that, even if the area where the officers entered was part of the defendant's curtilage, "where officers are engaged in a knock and talk investigative procedure, they are not categorically excluded from entering the curtilage if circumstances make it reasonable to conclude that they might encounter the person being sought." *Radandt*, unpub op at 4. This holding is inconsistent with the analysis recently clarified by the United States Supreme Court in *Jardines*.

In *Jardines*, the Supreme Court reiterated that the Fourth Amendment "establishes a simple baseline . . . : When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines*, 569 US at ___; 133 S Ct at 1414, quoting *United States v Jones*, 565 US ___, ___ n 3; 132 S Ct 945, 950 n 3 (2012) (quotation marks omitted).[1] *Jardines* instructs that when officers physically enter and occupy the constitutionally protected area of the curtilage, the proper question is whether there was a license (implied or explicit) to do so. *Id*.

"[T]he knocker on the front door is treated as an invitation or license to attempt an entry" to a home. *Id*. at 1415, quoting *Breard v Alexandria*, 341 US 622, 626 (1951).

> This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." [*Jardines*, 133 S Ct at 1415-1416 (footnote omitted).]

Jardines held that the scope of this implied license is limited to approaching a home for a specific purpose.[2] *Jardines* further held that the scope of the implied license is also limited to a particular area—the

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[1] The *Jardines* Court emphasized that while *Katz v United States*, 389 US 347 (1967), added to this baseline by making clear that "property rights are not the sole measure of Fourth Amendment violations," *Katz* "does not subtract anything from the Amendment's protections when the Government *does* engage in [a] physical intrusion of a constitutionally protected area." *Jardines*, 569 US at ___; 133 S Ct at 1414 (internal quotation marks omitted) (emphasis and alteration in original).

[2] The *Jardines* Court concluded that the officers had exceeded the scope of the implied license by bringing a trained police dog onto the

area where "any private citizen" might approach a home to knock on the door. *Id*. at 1416. In other words, the question is whether "any private citizen" approaching a defendant's house would behave as the officers did.[3] If the officers' conduct exceeded the scope of the implied license, the "knock and talk" procedure violated the Fourth Amendment. The Court of Appeals majority erred when it ignored this controlling standard.

The implied license "typically permits the visitor to approach the home by the front path" and knock on the front door. *Id*. at ___; 133 S Ct at 1415. This case presents a more challenging question given the unusual nature of the defendant's house; the uncontested evidence reveals that the defendant's home did not have a clear "front" door for use by public visitors. The United States Supreme Court has not decided "whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door." *Carroll v Carman*, 574 US ___, ___; 135 S Ct 348, 352 (2014).

Because the scope of the implied license depends on how "any private citizen" approaching a home would behave, I would conclude that a member of the general public approaching a home would knock at the door that appears to be the public visitor entrance to the home. Where, as in this case, it is difficult to determine when approaching a home which of two entrances is the public visitor entrance, a member of the general public might approach and knock at either of those doors. In this case, the door on the side of the house facing the street was surrounded by an enclosed porch. Both the middle door and the back door led directly into the house. While the back door was not visible from the street, it was the first door that visitors would encounter as they approached the house if they drove fully into the driveway to park. Traffic patterns through the grass in the backyard made clear that the back door was regularly used.[4] No door had any indicia signaling that it was intended to be the public visitor entrance, such as a doorbell, door

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defendant's porch to conduct a search for drugs because "[t]here is no customary invitation to do *that*." *Id*. Because the officers gathered evidence by entering the defendant's curtilage to engage in conduct not explicitly or implicitly permitted by the homeowner, their conduct constituted a search within the meaning of the Fourth Amendment. *Id*. at ___; 133 S Ct at 1417.

The defendant in *Jardines* had conceded "the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him." *Id.* at ___; 133 S Ct at 1415 n 1.

[3] "Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id*. at ___; 133 S Ct at 1415.

[4] Deputy McCoy testified that the "officers thought it was possible that [the back door] was the primary door" because "there was a lot of

knocker, welcome mat, or wall-mounted mailbox. Because either door could have been the public visitor entrance, I would not conclude that the officers exceeded the scope of the implied license when they approached the house and knocked on both doors with the hope that they might speak with a resident.

The Court of Appeals majority erred, however, when it held that the officers were entitled to proceed to another door because they believed that someone was home and had not responded to their knock on the first door. *Jardines* instructs that the habits of the country create the implicit license that allows officers to enter a person's curtilage. See *Jardines*, 569 US at ___; 133 S Ct at 1415. "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Jardines*, 133 S Ct at 1414, quoting *Silverman v United States*, 365 US 505, 511 (1961).

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. [*Kentucky v King*, 563 US 452, 469-470 (2011).]

Exercising the right to retreat into one's home and to decline to speak with the person knocking on the door does not give greater license to the person knocking to proceed to other areas of one's property. If a person has no obligation to open the door, it cannot be, as the Court of Appeals majority held, that his or her failure to do so grants the visitor a license to enter other areas of the curtilage. The scope of the implied license neither expanded nor contracted when the residents failed to answer the knock at the first door.

Further, while the presence of a fence is a factor to be considered when determining if an area is curtilage, see *Dunn*, 480 US at 301, the fact that a house has "no fence blocking entry into the backyard, and no signs indicating an intent to keep the public out," *Radandt*, unpub op at 3, is not an invitation to wander freely on someone's curtilage and does not expand the scope of the implied license.

Accordingly, while no injustice results from allowing the Court of Appeals result to stand, I would issue an opinion correcting the erroneous analysis of the Court of Appeals majority and providing guidance for the lower courts on the proper analysis of a "knock and talk" procedure post-*Jardines*. I therefore respectfully dissent from the order vacating our July 1, 2015 order and denying leave to appeal.

BERNSTEIN and LARSEN, JJ., joined the statement of MCCORMACK, J.

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foot traffic to and from this door." This testimony was not controverted by any testimony or other evidence from the defendant.

TONDREAU v HENRY FORD MACOMB HOSPITAL, No. 152659; Court of Appeals No. 321514.

TONDREAU v HENRY FORD MACOMB HOSPITAL, No. 152689; Court of Appeals No. 321514.

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court's order denying the application for leave to appeal. I would peremptorily reverse, in part, the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition in favor of defendants, for the reasons stated in Court of Appeals Judge JANSEN's partial dissent. The testimony of plaintiff's expert witnesses on the secondary theory of causation—that Sandra Peetz might well have survived if the CT scan had been performed sooner—was unsupported by evidence and necessarily based on conjecture. Simply put, the jury cannot be permitted to speculate whether plaintiff's decedent would have survived had a CT scan been performed sooner than it actually was performed.

A plaintiff in a medical malpractice action must establish "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury."[1] MCL 600.2912a(2) specifically provides that a plaintiff in a medical malpractice action "cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."[2] Expert testimony is generally required to establish the standard of care, a breach of the standard of care, and causation in medical malpractice cases.[3] An "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury."[4]

On December 7, 2007, defendant Dr. Sachinder S. Hans, a vascular surgeon, performed a carotid endarterectomy[5] on Sandra Peetz. The procedure was completed and Peetz was in recovery by 11:00 a.m. Around 12:15 p.m., Hans assessed Peetz's condition and noted neuro-

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[1] *Locke v Pachtman*, 446 Mich 216, 222 (1994). See also MCL 600.2912a(1).

[2] MCL 600.2912a(2) also requires a plaintiff alleging medical malpractice to prove that "he or she suffered an injury that *more probably than not* was proximately caused by the negligence of the defendant or defendants." (Emphasis added.)

[3] *Woodard v Custer*, 473 Mich 1, 6 (2005); *Teal v Prasad*, 283 Mich App 384, 394-395 (2009).

[4] *Skinner v Square D Co*, 445 Mich 153, 173 (1994); see also *Craig v Oakwood Hosp*, 471 Mich 67, 87 (2004) ("[A] plaintiff cannot satisfy this [causation] burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation.").

[5] Carotid endarterectomy is a procedure to remove a buildup of plaque from the carotid artery walls.

logical deficits consistent with a stroke. Soon thereafter, Hans performed a second, emergency surgery to determine the cause of Peetz's symptoms. Hans did not discover indicia of a stroke during the surgery, but inserted a stent as a precaution, and the surgery was completed around 3:45 p.m. After seeing no improvement in Peetz's neurological condition, Hans ordered a CT scan at approximately 5:00 p.m. Peetz was taken in for the scan around 6:15 p.m. The scan revealed a chronic subdural hematoma with acute hemorrhage and subarachnoid bleeding. Shortly after, Peetz was placed on life support.[6] As the hematoma had expanded, Peetz's brain was compressed and shifted, and as a result her brainstem was herniated.

The testimony of plaintiff's experts failed to establish that Hans caused Peetz's death when he did not order a CT scan immediately after the second surgery. The experts offered conflicting opinions regarding when Hans should have ordered a CT scan. Dr. M. Wayne Flye testified that Hans's decision to perform a second surgery instead of ordering a CT scan after the first surgery was appropriate. While Flye testified that the CT scan should have been done sooner after the second surgery, however, he was unable to provide a specific time at which Peetz's condition could have been reversed, stating, "It's hard to tell. . . . I can't really tell you, no." He nonetheless concluded that minutes could have affected the result. Dr. Donald C. Austin testified that the CT scan should have been completed after the first surgery, but further stated that Peetz would have survived had the CT scan been done immediately after the second surgery. Significantly, neither expert provided objective medical evidence, such as peer-reviewed published literature of other objective medical data, to support his conclusion.[7] Absent that evidence, the jury would have been left to speculate whether Peetz would have survived had a CT scan been performed sooner.[8]

The testimony of plaintiff's experts also failed to establish that there was a 50% or greater chance of an opportunity to survive or achieve a better result, as required by MCL 600.2912a(2), had Hans ordered the CT scan immediately after the second surgery. Flye testified equivocally when asked if Peetz more likely than not would have survived if the CT

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[6] Peetz died the following day when life support was removed.

[7] While peer-reviewed, published literature is not always necessary to meet the requirements of MRE 702, in this case the lack of supporting literature, along with the lack of any other form of support for these expert opinions, renders the testimony inadmissible under MRE 702. See *Edry v Adelman*, 486 Mich 634, 641 (2010).

[8] *Locke*, 446 Mich at 229 ("[T]he jury should not be left to speculate in this regard. It is precisely to avoid such speculation that expert testimony is ordinarily required."); *Skinner*, 445 Mich at 166 (" 'There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess . . . .' ") (citation omitted).

scan had been done right after the second surgery,[9] and he provided no factual or medical basis for his opinion. Austin testified equivocally when asked during what time Peetz's condition could have been reversed or she could have been saved. Significantly, medical literature before the trial court stated that intracerebral hemorrhages following carotid endarterectomies, like that sustained by Peetz, are extremely rare and almost always fatal. Therefore, plaintiff failed to overcome the MCL 600.2912a(2) bar to recovery when the opportunity to survive was 50% or less.

The speculative testimony and unsupported, conclusory opinions offered by plaintiff's experts in regards to the timing of the CT scan failed to sufficiently establish proximate causation. Defendants were therefore entitled to summary disposition.[10] Accordingly, I respectfully dissent and would reverse the judgment of the Court of Appeals in regards to the CT scan theory of causation.

MARKMAN, J., joined the statement of ZAHRA, J.

PEOPLE v HALE, No. 154057; Court of Appeals No. 332772.

PEOPLE v DUKES, No. 154099; Court of Appeals No. 332255.

Statement Regarding Decision on Motion for Disqualification Entered July 29, 2016:

PEOPLE v RICHARDSON, No. 153970; Court of Appeals No. 314245.

VIVIANO, J. On July 21, 2016, defendant filed a motion to disqualify me from this case. Having presided over defendant's trial, I would have recused myself from the case, regardless of defendant's motion. Therefore, I would grant defendant's motion.

Leave to Appeal Denied August 2, 2016:

KOLAILAT v MCKENNETT, No. 153075; Court of Appeals No. 328333.

MCCORMACK, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal for the reasons identified in my dissenting statement in *Mabry v Mabry*, 499 Mich 997 (2016).

BERNSTEIN, J., joined the statement of MCCORMACK, J.

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[9] Flye answered:

> Well, it depends upon when you do it. If you did it 20 minutes before the CT scan was reported, it's hard to say, but within a reasonable — you can get a CT scan from the operating room in 45 minutes. I would think that in that setting more than likely the patient would have been salvaged.

[10] See *Wischmeyer v Schanz*, 449 Mich 469, 484 (1995) (stating that failure to prove any one of the elements of a medical malpractice claim is fatal).

MABRY v MABRY, No. 153082; Court of Appeals No. 329786.

MCCORMACK, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would grant leave to appeal to address whether *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584 (2015), compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married.

Until 2015, same-sex couples were not permitted to marry in Michigan. See MCL 551.1. Nor did Michigan recognize a legal marriage between a same-sex couple solemnized in another jurisdiction. See MCL 551.271; Const 1963, art 1, § 25. Michigan also prohibited second-parent adoption between unmarried couples. See MCL 710.24. Thus, before the Supreme Court's decision in *Obergefell*, a same-sex partner had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner. I would grant leave to appeal to consider whether the Court of Appeals' peremptory order in this case illustrates and perpetuates the troubling effect of this state's unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in *Obergefell*.

The relationship between the parties in this case was longstanding and committed. The plaintiff and the defendant began their relationship in 1995 in Philadelphia and soon after moved together to Michigan. The parties took repeated steps to solidify their relationship and demonstrate their commitment to one another. These steps included filing a declaration of domestic partnership, purchasing a home together, entering a formal domestic-partnership agreement, solemnizing their relationship in a commitment ceremony in Hawaii, and entering into a marriage covenant in the form of a ketubah. The defendant took the plaintiff's last name. During the entire course of their relationship, they were prohibited from marrying each other in Michigan, and Michigan did not recognize extra-jurisdictional same-sex marriage.

After taking these deliberate steps to solidify their relationship, the parties decided to have children. They agreed that the defendant would carry the children through pregnancy using an anonymous donor. The parties had three children between 2001 and 2008, all of whom were biological children of the defendant but took the plaintiff's last name and were parented by both the defendant and the plaintiff. During their relationship, the plaintiff's parental role in the children's lives was significant: she provided the defendant and the children with health insurance, she was the sole financial provider for the family, and she provided care and guidance to the children. The defendant executed a will and trust agreements that provided that in the event of her death, the plaintiff would be the children's legal guardian and conservator.

In 2010, five years before the decision in *Obergefell*, the parties ended their 15-year relationship. For the following year, the plaintiff remained in the family home, continued paying for health insurance for the defendant and the children, and paid all other family bills and living

expenses. Eventually, the parties were unable to resolve custody and financial-support arrangements, and the defendant prohibited the plaintiff from seeing the children.

After *Obergefell* was decided, the plaintiff filed a complaint for custody and parenting time, seeking legal and physical custody of the parties' three children pursuant to Michigan's common-law equitable-parent doctrine. The trial court denied the defendant's early motion for summary disposition, noting that it needed further factual development before it could decide whether the plaintiff had standing to pursue custody under the equitable-parent doctrine. See *Atkinson v Atkinson*, 160 Mich App 601 (1987). The defendant filed an interlocutory appeal in the Court of Appeals, and the Court of Appeals peremptorily vacated the trial court's denial of summary disposition. The order held that the plaintiff did not have standing to bring a custody action pursuant to the equitable-parent doctrine because that doctrine is only available to a parent who was married. *Mabry v Mabry*, unpublished order of the Court of Appeals, entered December 18, 2015 (Docket No. 329786). The plaintiff sought leave to appeal in this Court, arguing that the failure to apply the equitable-parent doctrine to nonbiological parents who were unconstitutionally prohibited from marrying the biological parent of their children violated her equal protection and due process rights as well as those of her children.

The equitable-parent doctrine recognizes a third person who is not a biological parent as the child's parent when (1) the would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time, (2) the would-be equitable parent desires to have the rights afforded a parent, and (3) the would be-equitable parent is willing to pay child support. *Atkinson*, 160 Mich App at 608-609. This Court endorsed the equitable-parent doctrine in *Van v Zahorik*, 460 Mich 320, 330-331 (1999), but limited its application to would-be parents who were married.

The plaintiff's constitutional challenges merit further review from this Court. I would grant leave to consider whether *Obergefell* compels us to apply the equitable-parent doctrine to same-sex couples who had children conceived or adopted by one party during their relationship but were unconstitutionally prohibited from marrying under this state's law. I would address whether the line drawn by the Court of Appeals in this case impermissibly violates both the plaintiff's and her children's equal protection and due process rights by creating an untenable requirement that same-sex couples have sought a legal marriage in another jurisdiction, despite the fact that any extra-jurisdictional marriage would have been legally unrecognized in Michigan.

In *Obergefell*, the Supreme Court held that Michigan's ban on same-sex marriage was unconstitutional, that marriage is a fundamental right, and that same-sex couples and their children are equally entitled to the benefits of marriage. *Obergefell*, 576 US ___, ___; 135 S Ct at 2604-2605. Indeed, the children of same-sex couples and their constitutional rights were central to the Court's analysis in *Obergefell*. The Court reasoned:

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. [*Id*. at ___; 135 S Ct at 2600-2601.]

The Court's decision in *Obergefell* reflects a long-recognized constitutional principle that children born to unmarried parents are entitled to the same benefits as children born to married parents. See, e.g., *Weber v Aetna Cas & Surety Co*, 406 US 164, 165 (1972) (holding that a workers' compensation statute denying equal recovery rights to dependent unacknowledged children violated equal protection); *Clark v Jeter*, 486 US 456, 457, 465 (1988) (holding that a six-year statute of limitations for paternity actions to seek support, required for a child of an unmarried couple but not a child of a married couple, violated equal protection); *New Jersey Welfare Rights Org v Cahill*, 411 US 619, 621 (1973) (holding that a state program that denied benefits to children who were not of the marriage violated equal protection).

The Court of Appeals' order in this case overlooks this general principle. If not for this state's unconstitutional prohibition on their parents' right to marry, the children in this case would be entitled to all the benefits conferred on children of opposite-sex couples by the equitable-parent doctrine. And as a result of the Court of Appeals' order, the parties' children will be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, or inherit from her if she dies intestate.

What is more, the plaintiff's fundamental right to parent her children is potentially violated by the Court of Appeals' ruling. Denying individuals who were unconstitutionally prohibited from marrying access to the equitable-parent doctrine perpetuates the constitutional harms inflicted by the state's unconstitutional prohibition of same-sex marriage. By denying the parties access to marriage, and subsequently to the benefits of marriage, including the equitable-parent doctrine, the Court of Appeals' ruling may contravene the United States Supreme Court's direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage.

This case is of course distinguishable from our decision in *Van*, in which the parties had the option to get married, but chose not to. *Van*, 460 Mich at 323. The plaintiff here was unconstitutionally prohibited from marrying the defendant, though she took every legal step available to replicate marriage. In my view, the Court of Appeals' decision overlooks our central reasoning in *Van*, in which we noted that limiting the equitable-parent doctrine to children born or adopted within a marriage reinforces the "importance of marriage and legitimacy." *Id*. at 333. When the parents themselves did not choose not to marry, but

instead had that choice made for them by our state's laws, and the parents otherwise demonstrated the same commitment and legitimacy as married parents, their children should not be barred from the potential benefits of our common-law rule. In other words, we should consider whether the constraint that makes it impossible for the children of same-sex parents to benefit from the equitable-parent doctrine is constitutionally viable post-*Obergefell*.

The defendant's argument that this Court should not apply the equitable-parent doctrine to the plaintiff because it would enable any third party to gain parental rights is not powerful.[1] The plaintiff is not *any* person. She acted as a parent, providing her name, her love, support, and affection, her financial support, and her health insurance to these children. Yet, under the Court of Appeals' order, she is a legal third party to the children. I think that this Court might fashion a rule to ensure that the plaintiff's and the children's constitutional rights are protected without opening the doctrine to any third party seeking parental rights.

Not surprisingly, this issue is not unique to Michigan. Other state courts have grappled with the implications of *Obergefell* on common-law doctrines akin to our equitable-parent doctrine. Many have already extended similar equitable doctrines to same-sex couples who were prohibited from marrying yet had children during their relationship. These states have provided guidance and workable rules for trial courts under similar doctrines while preserving the constitutional rights of same-sex couples who were unconstitutionally prohibited from marrying and parenting their children. See, e.g., *In re Registered Domestic Partnership of Madrone*, 271 Or App 116, 129 (2015) (holding that "[b]ecause the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited"); *Ramey v Sutton*, 2015 Okla 79, ¶ 13; 362 P3d 217, 220-221 (2015) (holding that a same-sex couple's failure to marry before *Obergefell* could not be used to prevent the nonbiological parent from seeking custody of the child when she had acted *in loco parentis* to the child); cf. *Conover v Conover*, ___ Md ___, ___ (July 7, 2016) (Docket No. 79), pp 35-36 (holding that a same-sex partner had standing under the de facto parent doctrine to pursue custody of a child born to her partner before their marriage).[2]

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[1] The defendant has argued that the equitable-parent doctrine should not apply to the plaintiff because it would infringe her rights to parent by allowing any person the ability to seek custody. See *Troxel v Granville*, 530 US 57 (2000) (holding that a visitation statute that allowed *any person* to petition a court for visitation rights violated the fundamental right of the child's parents to parent).

[2] Many other states addressed this issue before *Obergefell*. See, e.g., *Bethany v Jones*, 2011 Ark 67, pp 10-12 (2011) (holding that a same-sex partner, who was not legally married, stood *in loco parentis* to the child); *ENO v LMM*, 429 Mass 824, 829-830 (1999) (holding that a same-sex

As with all child custody disputes, the child's best interests are paramount, and trial courts regularly engage in fact-finding to determine how those interests should be served. I believe Michigan's trial courts are capable of evaluating the parties' relationship to determine whether the parties would have married but for Michigan's unconstitutional prohibition of same-sex marriage in the limited number of cases in which this issue will arise.[3]

Like the many other state courts addressing this issue, then, I would grant leave to appeal to consider whether *Obergefell v Hodges* compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married. The Constitution might require that the children born and adopted into same-sex families be able to access the same benefits that children born into opposite-sex families have under Michigan law when they arrive at our courthouse doors. At the very least, this question deserves this Court's considered analysis.

BERNSTEIN, J., joined the statement of MCCORMACK, J.

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partner was the de facto parent of the biological child of her former partner); *Mullins v Picklesimer*, 317 SW3d 569, 574-577 (Ky, 2010) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when the child was born into the relationship and the partner coparented the child); *In re Parentage of LB*, 155 Wash 2d 679, 683 (2005) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when she was the de facto parent). And while some other states have yet to squarely address the issues raised in this case post-*Obergefell*, they have resolved similar issues on the basis of their unique state statutes. See, e.g., *McGaw v McGaw*, 468 SW3d 435, 442-443, 448 (Mo App, 2015) (holding that the equitable-parentage theory did not apply to a same-sex couple who had separated before *Obergefell* because there was a separate statute enabling the parent to seek third-party custody and visitation); *Russell v Pasik*, 178 So 3d 55, 61 (Fla App, 2015) (holding that a same-sex partner did not have standing to seek custody and visitation rights by asserting de facto parent status, but noting that the same-sex partner could have adopted the children under Florida's adoption statutes); *Sheets v Mead*, 238 Ariz 55, 58 (Ariz App, 2015) (denying nonparent visitation to a same-sex partner, who had been a foster parent of the child with her partner before the couple's separation, after the other partner adopted the child because the child was no longer "born out of wedlock" as required by the statute providing nonparent visitation rights).

[3] Any exception to our decision in *Van*, 460 Mich 320, limiting the equitable-parent doctrine to married couples would extend only to the small group of same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in *Obergefell* and have a custody dispute.

Leave to Appeal Denied August 19, 2016:

HUTCHISON v LEADBETTER, No. 153938; Court of Appeals No. 332503.

In re WISE, No. 154024; Court of Appeals No. 332208.

In re MARTIN, No. 154086; reported below: 315 Mich App ___.

In re FOSTER-RIMSON and *In re* RIMSON, Nos. 154221 and 154222; Court of Appeals Nos. 330938 and 330939.

Leave to Appeal Denied September 1, 2016:

O'CONNELL v DIRECTOR OF ELECTIONS, No. 154279; Court of Appeals No. 334365.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered February 3, 2016:

PROPOSED AMENDMENT OF MCR 3.925.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.925, 8.119, and 8.302 and new Rule 5.133 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT ~~FILES~~RECORDS; SETTING ASIDE ADJUDICATIONS.

(A)-(C) [Unchanged.]

(D) Public Access to Case File Records; Confidential File.

(1) General. Case file ~~R~~records ~~of the juvenile cases~~maintained under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., other than confidential files, must be open to the general public.

(2) Confidential Files. Confidential files are defined in MCR 3.903(A)(2) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order. Only persons who are found by the court to have a legitimate interest may be allowed access to the confidential files. In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.

(E) Retention and Destruction of Court ~~Case Files and Other Court~~ Records. ~~This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).~~

~~(1) Destruction Generally; Effect.~~ The court ~~may~~shall destroy its case files and other court records only as prescribed by ~~this rule and~~ the ~~approved General Records Retention and Disposal Schedule #16 —~~

~~Michigan Trial Courts~~records retention and disposal schedule established under MCR 8.119(K). Destruction of a case record ~~file~~ does not negate, rescind, or set aside an adjudication.

~~(2) Register of Actions, Indexes, and Orders. The register of actions in a case filed under the Juvenile Code and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; the order of adjudication and the order terminating jurisdiction for each delinquency case; the latest dispositive order for each designated case; and the order appointing a guardian for each juvenile guardianship case.~~

~~(3) Delinquency and Motor Vehicle Code Case Files.~~

~~(a) Except as provided in subrule (2), the court may destroy the diversion case file of a juvenile after the juvenile becomes 17 years of age.~~

~~(b) Except as provided in subrule (2), the court may destroy all case files of matters heard on the consent calendar after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained permanently as a nonpublic record.~~

~~(c) Except as provided by subrules (2), (3)(a), and (3)(b), the court may destroy the legal records in the case files pertaining to a person's juvenile offenses when the person becomes 30 years of age. The social records in the case files pertaining to a person's juvenile offenses may be destroyed three years after entry of the order terminating jurisdiction of that person or when the person becomes 18 years old, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(3). The court must destroy the records in traffic and local ordinance case files opened by issuance of a citation pursuant to the motor vehicle code or a local corresponding ordinance when the person becomes 30 years of age.~~

~~(d) If the court destroys its case files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.~~

~~(4) Child Protective Case Files. Except as provided in subrule (2), the court may destroy the legal records in the child protective proceeding case files pertaining to a child, 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminating jurisdiction of that child or when the child becomes 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(3).~~

~~(5) Personal Protection Proceeding Case Files. The court may destroy the legal and social records in personal protection proceeding case files~~

~~pertaining to a juvenile respondent three years after the expiration date of the personal protection order or the latest dispositive order on a violation of the personal protection order, or when the juvenile respondent becomes 18 years of age, whichever is later.~~

~~(6) Juvenile Guardianship Case Files. Except as provided in subrule (2), the court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian.~~

~~(7) Probation Case Files. The court may destroy the records in probation case files pertaining to a juvenile three years after an order terminating jurisdiction or when the juvenile becomes 18 years of age, whichever is later.~~

(F)-(G) [Unchanged.]

PROPOSED NEW MCR 5.133.

RULE 5.133. OPENING WILLS ORIGINALLY FILED FOR SAFEKEEPING.

If a will filed for safekeeping under MCL 700.2515 remains unopened 100 years after the date it was filed with a court, the death of the testator will be presumed and the will shall be opened by the probate register and maintained in accordance with MCR 8.302. Upon opening, the will shall be considered a will delivered after death of testator and shall be retained for the period prescribed in the record retention disposal schedule established under MCR 8.119.

PROPOSED AMENDMENT OF MCR 8.119.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) [Unchanged.]

(B) Records Standards. The clerk of the court shall comply with the records standards in this rule, MCR 1.109, and as ~~otherwise~~ prescribed by the Michigan Supreme Court.

(C) Filing of Documents and Other Materials. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Documents and other materials filed with the court as defined in MCR 2.107(G) must comply with Michigan Court Rules and the Michigan ~~Supreme Court records~~Trial Court Case File Management S~~s~~tandards. The clerk of the court may only reject documents that do not meet the following minimum filing requirements:

(1)-(5) [Unchanged.]

(D) Records Kept by the Clerk of the Court. The clerk of the court shall ~~keep~~maintain the following case records in accordance with the Michigan ~~Supreme~~ Trial Court Case File Management Standards, Michigan Trial Court ~~r~~Records Retention and Disposal Standards and Guidelines, ~~standards~~ and approved records retention and disposal schedules~~local court plans~~. Documents and other materials made confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to subrule (I) that makes a document or other materials in that case confidential applies uniformly

to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) ~~Indexes~~ Case History and Case Files. ~~Except for civil infractions, t~~The clerk shall ~~keep and~~ maintain records of each case consisting of case history~~a numerical index, an alphabetical index, a~~ (known as a register of actions)~~;~~ and, except for civil infractions, a case file in such form and style as may be prescribed by the ~~Supreme Court~~State Court Administrative Office. Each case shall be assigned a case number on receipt of a complaint, petition, or other initiating document. The case number shall comply with MCR 2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under ~~the Juvenile Code~~Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., as required under MCR 5.113(A)(1)(b)(ii). The case number (and petition number if applicable) shall be recorded in the court's automated case management system and on the ~~register of actions~~, case file~~, numerical index, and alphabetical index~~. The records shall include the following characteristics:

~~(a) Numerical Index. The clerk shall maintain a numerical index as a list of consecutive case numbers on which the date of filing and the names of the parties are recorded. The index may be maintained either as a central index for all cases filed in the court or as separate lists for particular types of cases or particular divisions of the court.~~

~~(b) Alphabetical Index. The clerk shall maintain a central alphabetical index or separate alphabetical indexes for particular types of cases or particular divisions of the court on which the date of filing, names of all parties, and the case number are recorded.~~

(c~~a~~)~~Register of Actions~~ Case History. The clerk shall ~~keep~~create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of the parties, and names of any attorneys of record. The ~~register of actions~~ case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Case File Management Standards. ~~When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:~~

~~(i) the offense (if one);~~

~~(ii) the judge assigned to the case;~~

~~(iii) the fees paid;~~

~~(iv) the date and title of each filed item;~~

~~(v) the date process was issued and returned, as well as the date of service;~~

~~(vi) the date of each event and type and result of action;~~

~~(vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;~~

~~(viii) the orders, judgments, and verdicts;~~

~~(ix) the judge at adjudication and disposition;~~

~~(x) the date of adjudication and disposition; and~~

~~(xi) the manner of adjudication and disposition.~~

Each ~~notation~~entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each ~~notation~~entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(~~d~~b) Case File. The clerk of the court shall maintain a ~~paper and/or electronic~~ file ~~for~~of each action, bearing the case number assigned to it, ~~in which the clerk shall keep~~for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any~~. Additionally, the clerk shall keep in the file all~~ other materials prescribed by court rule, statute, or ~~as~~ court order~~ed by the court~~ to be filed with the clerk of the court. If ~~other~~ case file records ~~of a case file~~ are maintained separately from the case files, the clerk shall ~~keep~~ maintain them as prescribed by trial court case file management standards.

(2) Calendars. The clerk may maintain calendars of actions. A calendar is a schedule of cases ready for court action that identifies times and places of activity.

(3) Abolished Records.

(a) Journals. Except for recording marriages, journals shall not be maintained.

(b) Dockets. A register of actions replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered in the court's automated case management system~~on the register of actions~~.

(E) Other Case Records. The clerk or other persons designated by the chief judge of the court shall ~~keep~~maintain in the manner prescribed by these rules, other materials filed with or handled by the court for purposes of case processing, including but not limited to wills filed for safekeeping, case evaluations, exhibit logs, presentence reports, probation files, problem-solving court treatment files, financial statements for collections, and friend of the court records.

(F)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk may not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information ~~in a register of actions~~ through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case ~~records~~

files may be provided through electronic means only upon request. The court may provide access to any case record that is not ~~a document~~available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(C)(2), in a medium ~~in~~for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a case record or information contained in a record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (I), any person may inspect that record and may obtain copies as provided in subrule (J). In accordance with subrule (J), the court may collect a fee for the cost of this service, including the cost of providing the new record in a particular medium.

(2) Every court shall adopt an administrative order pursuant to MCR 8.112(B) to

(a) make reasonable regulations necessary to protect its public records and prevent excessive and unreasonable interference with the discharge of its functions;

(b) establish a policy for whether to provide access for records defined in subrule (F) and if access is to be provided, outline the procedure for accessing those records;

(c) specify the reasonable cost of reproduction of records provided under subrule (J); and

(d) specify the process for determining costs under subrule (J).

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5)-(7) [Unchanged.]

(J) [Unchanged.]

(K) Retention Periods and Disposal of Court Records. For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be ~~destroyed~~disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before ~~destroying~~disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such ~~by State Archives~~ in the Michigan trial courts approved records retention and disposal schedule. An order ~~of destruction~~disposing of court records shall comply with the retention periods established by the State Court

Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, ~~and~~ Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5.

(L) [Unchanged.]

RULE 8.302. ~~DOCUMENTS AND FILES~~ RECORDS AND ENTRIES KEPT BY CLERK.

~~Original orders and letters of authority, after being recorded, must be placed in the files of the court. For security purposes, testamentary documents of deceased persons, bonds, orders, and such other documents as the court directs must be copied by microfilming or other means promptly after filing or issuance and preserved in the records of the court separately from the files. In addition, t~~The clerk of every probate court shall maintain court records and make reports as prescribed by MCR 8.119. In addition, any unsealed testamentary document filed with the probate court must be safeguarded by reproducing the document in a format authorized by the Records Reproduction Act (MCL 24.401 *et seq.*) and storing it with the files of the court or offsite. The original of any unsealed testamentary document must remain with the probate court in fireproof storage. Sealed testamentary documents filed with the probate court for safekeeping under MCL 700.2515 must also be safeguarded in fireproof storage.

Staff Comment: The proposed amendments of MCR 3.925, 8.119, and 8.302 and proposed new MCR 5.133 are an expected progression in the development of policies and procedures arising from a larger project that was initiated, in part, through the Access to Records Committee in 2009. These policies and procedures are intended to standardize management of court records and to provide a uniform basis for developing parameters on the use of technology in creating, accessing, routing, maintaining, and disposing of court records. These particular amendments will assist in implementing the goals of 2013 PA 199 and 201 and improving the policies and procedures adopted by the Court in 2012 under Administrative File No. 2006-47.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by May 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered March 23, 2016:

PROPOSED AMENDMENTS OF MCR 2.004, MCR 3.705, MCR 3.708, MCR 3.804, MCR 3.904, MCR 4.101, MCR 4.201, MCR 4.202, MCR 4.304,

MCR 4.401, MCR 5.119, MCR 5.140, MCR 5.402, MCR 5.404, MCR 5.738a, MCR 6.006, AND MCR 6.901.

On order of the Court, this is to advise that the Court is considering amendment of Rules 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.004. INCARCERATED PARTIES.

(A)-(B) [Unchanged.]

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call or by ~~video conference~~ videoconferencing technology in a ~~hearing or~~ conference as described in subrule (E)~~, including a friend of the court adjudicative hearing or meeting~~. The order shall include the date and time for the ~~hearing~~conference, and the prisoner's name and prison identification number, and shall be served at least 7 days before the conference by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

(D) [Unchanged.]

(E) The purpose of the ~~telephone call or video conference~~ incarcerated party's participation as described in ~~this~~ subrule (C) is to determine

(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,

(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,

(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including par-

ticipation ~~in~~by way of additional telephone calls or ~~video conferences~~videoconferencing technology as permitted by the Michigan Court Rules, and

(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

(F)-(G) [Unchanged.]

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A) [Unchanged.]

(B) Hearings.

(1)-(2) [Unchanged.]

(3) The hearing shall be held on the record. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(4)-(6) [Unchanged.]

(C) [Unchanged.]

RULE 3.708. CONTEMPT PROCEEDINGS FOR VIOLATION OF PERSONAL PROTECTION ORDERS.

(A)-(C) [Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(6) [Unchanged.]

(7) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location.

(E)-(G) [Unchanged.]

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, and with the consent of the parties, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location. A party who does not consent to the use of videoconferencing technology to take testimony from a person at the hearing shall not be required to articulate any reason for not consenting.

(3)-(5) [Unchanged.]

In addition to such a sentence, the court may impose other conditions to the personal protection order.

(I) Mechanics of Use. The use of videoconferencing technology under this rule must be in accordance with the standards established by the

State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

RULE 3.804. CONSENT AND RELEASE.

(A) [Unchanged.]

(B) Hearing.

(1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.

(2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29. Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).

(3) The court may not use videoconferencing technology for the consent and release hearings required to be held pursuant to the adoption code and this subrule.

(C) [Unchanged.]

RULE 3.904. USE OF ~~INTERACTIVE VIDEO~~VIDEOCONFERENCING TECHNOLOGY.

~~(A) Facilities. Courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).~~

~~(B) Hearings.~~

~~(1) Delinquency Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.~~

~~(2) Child Protective Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings or review hearings.~~

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Courts may use videoconferencing technology in delinquency, designated, and personal protection violation proceedings as follows.

(1) Juvenile in the Courtroom or at a Separate Location. Videoconferencing technology may be used between a courtroom and a facility when conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985, postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.

Alternative A	Alternative B
(2) Juvenile in the Courtroom-Other Proceedings. As long as the juvenile is either	(2) Juvenile in the Courtroom-Other Proceedings. Except as otherwise provided in this

present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter, except that parties must consent if the proceeding is a trial. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.	rule, as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter. If the proceeding is a trial, only the consent of the juvenile is required. If the petitioner objects to the use of two-way interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors: (a) Whether any undue prejudice or infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result. (b) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits. (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony. (d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully. (e) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom. (f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(B) Child Protective and Juvenile Guardianship Proceedings.

(1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1), in any proceeding.

(2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in the following proceedings:

(a) removal hearings under MCR 3.967, evidentiary hearings, and termination of parental rights proceedings under MCR 3.977;

Alternative A	Alternative B
(b) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.	(b) trials, with the respondent's consent, except as otherwise provided by law. If the petitioner objects to the use of two-way interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors: (a) Whether any undue prejudice or infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result. (b) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits. (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony. (d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully. (e) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom. (f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

[**Note**: For a description of the different approaches expressed by the two alternatives above, please see the note following MCR 6.006 in this

order. Because both alternatives in MCR 3.904 represent proposed new language in this rule, the alternatives are underlined, but there is no strikethrough like the side-by-side comparison of the proposed alternatives of MCR 6.006(C)(2).]

(C) Mechanics of Use. The use of ~~two-way interactive video~~videoconferencing technology under this rule must be ~~conducted~~ in accordance with ~~any requirements and guidelines~~the standards established by the State Court Administrative Office. All proceedings at which ~~such~~ videoconferencing technology is used must be recorded verbatim by the court.

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

(1)-(4) [Unchanged.]

(5) For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(H) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(4) [Unchanged.]

(5) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1)-(2) [Unchanged.]

(3) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(I)-(L) [Unchanged.]

RULE 4.304. CONDUCT OF TRIAL.

(A) Appearance. If the parties appear, the court shall hear the claim as provided in MCL 600.8411. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1). The trial may be adjourned to a later date for good cause.

(B) [Unchanged.]

RULE 4.401. DISTRICT COURT MAGISTRATES.

(A) Procedure. Proceedings involving district court magistrates must be in accordance with relevant statutes and rules.

(B) Duties. Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division.

(C) Control of Magisterial Action. An action taken by a district court magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves.

(D) Appeals. Appeals of right may be taken from a decision of the district court magistrate to the district court in the district in which the magistrate serves by filing a written claim of appeal in substantially the form provided by MCR 7.104 within 7 days of the entry of the decision of the magistrate. No fee is required on the filing of the appeal, except as otherwise provided by statute or court rule. The action is heard de novo by the district court.

(E) A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006.

RULE 5.119. ADDITIONAL PETITIONS; OBJECTIONS; HEARING PRACTICES.

(A)-(D) [Unchanged.]

(E) Use of Videoconferencing Technology.

(1) Hearing on Objection. For a hearing on an objection, on motion of any interested person and upon a showing of good cause, the court may use videoconferencing technology to take testimony by any person unless the subject of the initial petition does not consent to the use of videoconferencing technology.

(2) Hearing on Conduct of Fiduciary. If a hearing is scheduled to determine whether a fiduciary is properly performing his or her duties, on motion of any interested person and upon a showing of good cause, the court may use videoconferencing technology to take testimony by any person unless the subject of the initial petition does not consent to the use of videoconferencing technology.

RULE 5.140. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A) Except as otherwise prescribed by MCR 5.119, MCR 5.402(F), MCR 5.404(B), or MCR 5.738a, for any hearing held under this chapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(B) Mechanics of Use. The use of videoconferencing technology under this chapter must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

RULE 5.402. COMMON PROVISIONS.

(A)-(E) [Unchanged.]

(F) Use of Videoconferencing Technology. Except as prohibited by MCR 5.404(B)(1), the courts may use videoconferencing technology to

conduct any hearing in a guardianship proceeding unless the subject of the initial petition does not consent to the use of videoconferencing technology.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) [Unchanged.]

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid. The court may not use videoconferencing technology for the consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and this subrule.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

RULE 5.738a. USE OF ~~INTERACTIVE VIDEO~~ VIDEOCONFERENCING TECHNOLOGY.

(A) ~~Probate courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).~~

~~(B)~~ Hearings. ~~Probate~~The court~~s~~ may use ~~two-way interactive vid-eo~~videoconferencing technology to conduct any hearing~~s concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities.~~ in a mental health proceeding under any of the following conditions:

(1) The subject of the petition does not object to the use of videoconferencing technology.

(2) The court excludes the subject from a hearing if the subject's behavior at the hearing would make it impossible to conduct the hearing. The court shall enter on the record its reasons for excluding the subject of a petition from the hearing.

(3) The subject's presence is waived by the court if there is testimony by a physician or licensed psychologist who has recently observed the subject that the subject's attendance would expose the subject to serious risk of physical harm.

~~(C) Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.~~

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Defendant in the Courtroom - Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

Alternative proposals for MCR 6.006(C)(2)

Alternative A (current language unchanged)	Alternative Proposal B (with proposed changes shown)
(2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.	(2) trial, with the defendant's consent ~~of the parties, trials~~, except as otherwise provided by law. ~~A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.~~ If the prosecution objects to the use of two-way interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors: (a) Whether any undue prejudice or infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result. (b) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits. (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony. (d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.

	(e) Whether the person appearing by video-conferencing technology presents a significant security risk to transport and be present physically in the courtroom. (f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

[**Note:** The Court is considering alternative formulations of this provision. One alternative would maintain the current requirement that both parties at trial must consent to the use of videoconference equipment to take testimony from a person at another location. The other alternative would require only the defendant's consent; if the prosecutor objects, the court would make a decision on the basis of factors taken from MCR 2.407, which governs the use of videoconference equipment in civil proceedings. The alternatives are presented here in a side-by-side format to make clear the alternative positions expressed. Similar alternatives are provided in this order at MCR 3.904(A) and (B) regarding juvenile delinquency and child protective proceedings.]

(D) Defendant at a Separate Location — Felony Sentencing. As long as the defendant has waived the right to be present in the courtroom and agrees to participate in the proceeding via two-way interactive video technology, circuit courts may use videoconferencing equipment between a courtroom and a prison, jail, or other location to conduct sentencings for felony offenses.

~~(D)~~ (E) [Relettered, but otherwise unchanged.]

RULE 6.901. APPLICABILITY.

(A)-(B) [Unchanged.]

(C) Video and Audio Proceedings. The courts may use telephonic, voice, or videoconferencing technology under this subchapter as prescribed by MCR 6.006.

Staff comment: The proposed amendments of MCR 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 would permit courts to expand the use of videoconferencing technology in many court proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-18. Your comments

and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered March 23, 2016:

PROPOSED RESCISSION OF ADMINISTRATIVE ORDER NO. 1996-11.

On order of the Court, this is to advise that the Court is considering the rescission of Administrative Order No. 1996-11 and the adoption of Administrative Order No. 2016-XX. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

PROPOSED ADOPTION OF ADMINISTRATIVE ORDER NO. 2016-XX.

ADMINISTRATIVE ORDER NO. 2016-XX. ANTINEPOTISM ORDER.

1. Policy. All courts in Michigan are committed to make all business decisions — including decisions regarding employment, contracting with vendors, and selecting interns — on the basis of qualifications and merit, and to avoid circumstances in which the appearance or possibility of favoritism or conflicts of interest exist. Based on this policy, the following situations are prohibited:

a) A superior-subordinate relationship existing at or developing after the time of employment between any related employees; and

b) A related chief judge and a court administrator in the same court, regardless of whether the chief judge was elected, appointed, or named chief, and regardless of whether there is a superior-subordinate relationship.

Alternative Additional Provision [would include the language in "c)"—along with paragraphs "a)" and "b)" above]

c) A relative of a judge or justice employed within the same court.

[**Note**: The Court is considering whether an antinepotism policy should prohibit the employment of relatives in a subordinate/superior relationship and prohibit a chief judge and court administrator from being related as reflected in paragraphs "a)" and "b)"; in addition, the Court is considering—whether such a policy should also prohibit any relative of a judge or justice from being employed in the same court, as reflected in proposed paragraph "c)".]

All other relatives of court personnel who meet established requirements for job vacancies, court contract, or internship opportunities based on their qualifications and performance are eligible for judiciary

employment, contracts, or internships in the same court. But advocacy of one relative on behalf of the other is prohibited in all circumstances.

2. Definitions. For purposes of this order, the following definitions apply:

a) "Relative" includes spouse, child, parent, brother, sister, grandparent, grandchild, first cousin, uncle, aunt, niece, nephew, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, and father-in-law, whether natural, adopted, step or foster. The term also includes same-sex or different-sex individuals who have a relationship of a romantic, intimate, committed, or dating nature, which relationship arises after the effective date of this policy. The definition of relative does not include two related judges who are elected to or appointed to serve in the same court.

b) "Court Administrator" includes the highest level of administrator, clerk or director of the court who functions under the general direction of the chief justice or chief judge, such as state court administrator, circuit court administrator, friend of the court, probate court administrator, juvenile court administrator, probate register and district court administrator/clerk.

c) A "superior-subordinate relationship" is one in which one employee is the direct supervisor of the other employee.

3. Application. This policy applies to all applicants for employment, as well as all full-time and part-time employees, temporary employees, contractual employees, including independent contractors, interns, vendors, and personal service contracts. For purposes of this provision, an intern is a student or trainee who works for the court, with or without pay, to gain work experience. Further, a vendor is an individual or someone appearing on behalf of a corporation or other entity that offers to provide or provides goods or services to the court.

4. Affected Employees. No person shall be transferred, promoted, or rehired following separation in a position that would create a nepotic relationship in violation of this policy.

5. Collective Bargaining Agreements. After the effective date of this order, chief judges and court administrators are prohibited from entering into collective bargaining agreements inconsistent with this policy.

6. Conflicts. The chief judge of a court shall resolve any employment situations that conflict with or would conflict with this policy, unless the conflict involves a relative of the chief judge. In such a situation, the State Court Administrator shall resolve the issue.

7. Chief Judge Appointments. Nothing in this policy prohibits the Supreme Court from selecting any judge as a chief judge of a court. If such selection occurs, and such selection creates a nepotic relationship, the putative chief judge shall provide to the Court, and the Court shall approve, an alternative means by which the relative of the chief judge shall be supervised.

8. Grandfather clause. This policy shall not apply to any person who is an employee of a court on [insert effective date of order]. However, from the effective date of this order, no person may be transferred, promoted, or enter into a nepotic relationship in violation of this policy.

Staff Comment: The proposed new administrative order would provide a clearer and simplified version of the antinepotism policy to be used by courts in Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by July 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered March 30, 2016:

PROPOSED AMENDMENT OF MCR 6.112.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.112. THE INFORMATION OR INDICTMENT.

(A)-(F) [Unchanged.]

(G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. ~~This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.~~

(H) Amendment of Information or Notice of Intent to Seek Enhanced Sentence. The court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek

enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

Staff Comment: The proposed amendments of MCR 6.112 would provide clarification to the procedure for amending a notice of intent to seek an enhanced sentence by requiring such amendment to be approved by the court, and would eliminate the provision that makes the harmless-error standard inapplicable when a notice of intent to seek an enhanced sentence is not filed timely.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by July 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-39. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered August 10, 2016:

PROPOSED AMENDMENTS OF MCR 9.200 *et seq*.

On order of the Court, this is to advise that the Court is considering amendments of Rules 9.200 *et seq.* of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.200. CONSTRUCTION.

An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence in that

system, and to protect the public, the courts, and the rights of the judges who are governed by these rules in the most expeditious manner that is practicable and fair.

RULE 9.201. DEFINITIONS.

As used in this chapter, unless the context or subject matter otherwise requires

(A) "commission" means the Judicial Tenure Commission;

(B) "judge" means:

(1) a person who is serving as a judge or justice of any court of the judicial branch of state or local government ~~of an appellate or trial court~~ by virtue of election, appointment, or assignment;

(2) a magistrate or a referee of any such court; or

(3) a person who formerly held such office ~~and is named in~~ if a request for investigation ~~that~~ was filed during the person's ~~tenure~~ term of office. If the person is no longer a judge, ~~except that with respect to~~ and the alleged misconduct ~~that is~~ relates~~d~~ to the person's actions as a judge ~~office~~, it is not necessary that the request for investigation be filed during the ~~person's~~ former judge's ~~tenure~~ term of office; nothing in this paragraph deprives the attorney grievance commission of its authority to proceed against a former judge;

(C) "respondent" is a judge against whom a ~~complaint~~ request for investigation has been filed;

(D) "chairperson" is the commission chairperson and includes the acting chairperson;

(E) "master" means one or more judges or former judges appointed by the Supreme Court at the commission's request to hold hearings on a complaint against a ~~judge filed by the commission~~ respondent;

(F) ~~"examiner" means the executive director or equivalent staff member or other attorney appointed by the commission to present evidence at a hearing before a master or the commission, or in proceedings in the Supreme Court;~~ "disciplinary counsel" is the commission's executive director or other attorney appointed by the commission to act as the prosecutor in negotiating settlements, presenting evidence at the hearing on the complaint, and in proceedings in the Supreme Court;

(G) "commission counsel" is the attorney appointed by the commission to provide it with counsel whenever the commission appoints the executive director as disciplinary counsel. The disciplinary counsel may not serve as the commission counsel in the same case.

~~(G)~~(H) "request for investigation" is an allegation of judicial misconduct, physical or mental disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR ~~9.207~~9.220;

~~(H)~~(I) "complaint" is a written document ~~filed~~ issued at the direction of the commission, ~~recommending action against a judge and~~ alleging specific charges of misconduct in office, mental or physical disability, or some other ground that warrants ~~commission~~ action under Const 1963, art 6, § 30.

RULE ~~9.205~~9.202 STANDARDS OF JUDICIAL CONDUCT.

(A) Responsibility of Judge. A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. ~~In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.~~

(1) Misconduct in office includes, but is not limited to:

(a) persistent incompetence in the performance of judicial duties;

(b) persistent neglect in the timely performance of judicial duties;

(c) persistent failure to treat persons fairly and courteously;

(d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the commission in its investigation of a ~~judge~~respondent.

(2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, regardless whether the conduct ~~occurred before or after the respondent became a judge or~~ was related to judicial office. For purposes of this rule, only conduct that occurs during a judicial campaign or while the judge is serving as a judicial officer may be grounds for issuance of a complaint.

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

RULE ~~9.202~~9.210. JUDICIAL TENURE COMMISSION; ORGANIZATION.

(A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges shall be chosen by ~~mail~~ vote conducted by the state court administrator. The commissioners selected by the state bar members shall be chosen by ~~mail~~ vote conducted by the State Bar of Michigan. Both ~~mail~~ elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's selection, the selecting authority shall notify the Supreme Court and the Judicial Tenure Commission.

(B) Term of Office. A commissioner's term of office shall be 3 years. To achieve staggered terms, the following terms shall expire in consecutive years:

(1) one of the appointments of the Governor, the judge of a court of limited jurisdiction, and one of the attorneys selected by the state bar;

(2) the other appointment of the Governor, the probate judge, and the other attorney selected by the state bar;

(3) the Court of Appeals judge, the circuit judge, and the judge selected by the state bar.

(C) Oath of Office. The following oath shall be administered to all members of the Judicial Tenure Commission:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of Judicial Tenure Commission member according to the best of my ability."

~~(C)~~(D) Vacancy.

(1) A vacancy in the office of a commissioner occurs:

(a) when a commissioner resigns or is incapable of serving as a member of the commission;

(b) when a judge who is a member of the commission no longer holds the office held when selected;

(c) when an attorney selected by state bar members is no longer entitled to practice in the courts of this state; and

(d) when an appointee of the Governor becomes an attorney.

The commission shall notify the appointing authority of a vacancy.

(2) Vacancies must be filled by selection of a successor in the same manner required for the selection of the predecessor. The commissioner selected shall hold office for the unexpired term of the predecessor. Vacancies must be filled within 3 months after the vacancy occurs. If a vacancy occurs after the selection of a new commissioner but before that commissioner's term officially begins, the commissioner-elect shall fill that vacancy and serve the remainder of the unexpired term.

(3) A member may ~~retire~~resign by submitting a resignation in writing to the commission, which must certify the vacancy to the selecting authority.

~~(D)~~(E) Commission Expenses.

(1) The commission's budget must be submitted to the Supreme Court for approval.

(2) The commission's expenses must be included in and paid from the appropriation for the Supreme Court.

(3) A commissioner may not receive compensation for services but shall be paid reasonable and necessary expenses.

~~(E)~~(F) Quorum and Chairperson.

(1) At its first meeting in odd-numbered years, ~~T~~the commission shall elect from among its members a chairperson, a vice-chairperson, and a secretary, each to serve 2 years. The vice-chairperson shall act as

chairperson when the chairperson is absent. If both are absent, the members present may select one among them to act as temporary chairperson.

(2) A quorum for the transaction of business by the commission is 5.

(3) The vote of a majority of the members present constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.

(4) Regular meetings at which no public hearing is scheduled may be held in person, by telephone, or by teleconference, provided that the telephone or teleconference method is a secure connection.

(F)(G) Meetings of Commission. Meetings must be held at the call of the chairperson or the executive director, or upon the written request of 3 commission members.

(G)(H) Commission Staff.

(1) The commission shall employ as at-will employees an executive director or equivalent person or persons, and such other staff members as the commission concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget. With the advice and consent of the Michigan Supreme Court, the executive director shall be appointed for a term of six years, subject to reappointment, and the executive director's performance shall be evaluated annually by the commission. At least 60 days prior to the executive director's annual evaluation, the JTC shall solicit input from the Michigan Supreme Court on the executive director's performance.

(2) The executive director, other disciplinary counsel, or any other staff person who is involved in the investigation or prosecution of a judgerespondent

(a) shall not be present during the deliberations of the commission or participate in any other manner in the decision of the commission to file formal charges a complaint, or during the deliberations of the commission to recommend action by the Supreme Court with regard to that judgerespondent, and

(b) shall have no substantive ex parte communication with the commission regarding an investigation or a formal complaint that the commission has authorized.

(3) Commission employees are exempt from the operation of Const 1963, art 11, § 5, as are employees of courts of record.

RULE 9.2039.211. JUDICIAL TENURE COMMISSION; POWERS; REVIEW.

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish internal operating procedures administrative rules for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.

(B) Review as an Appellate CourtFunction of Commission. The commission may is not function as an appellate court and may not to review the decision of a court or to exercise superintending or adminis-

trative control of a court.~~,~~ It ~~but~~ may examine decisions incident to a ~~complaint~~ request for investigation of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR ~~9.207~~9.220. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.

(C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to restrict, control, or review the orders of the master or the commission.

(D) Errors and Irregularities. An investigation or proceeding under this subchapter may not be held invalid by reason of a nonprejudicial irregularity or for an error not resulting in a miscarriage of justice.

(E) Jurisdiction Over Visiting Judges. Notwithstanding MCR 9.116(B), the Attorney Grievance Commission may take action immediately with regard to a visiting judge who currently holds no other judicial office if the allegations pertain to professional or personal activities unrelated to the judge's activities as a judge.

RULE ~~9.204~~9.212. DISQUALIFICATION OF COMMISSION MEMBER OR EMPLOYEE.

(A) Disqualification From Participation. A judge who is a member of the commission or a justice of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's or justice's own actions or for any reason set forth in MCR 2.003(B).

(B) Disqualification from Representation. A member or employee of the commission may not represent

(1) a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation; or

(2) a judge in proceedings before the Attorney Grievance Commission, or the Attorney Discipline Board and its hearing panels, as to any matter that was pending before the Judicial Tenure Commission during the member's or the employee's tenure with the commission.

The law firm of an attorney member of the commission may not represent a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation.

RULE ~~9.207~~9.220. PRELIMINARY INVESTIGATION~~; NOTICE~~.

(A) Request for Investigation. A request for investigation of a judge must be made in writing and verified on oath of the ~~complainant~~grievant. The commission also is authorized to act on its own initiative or at the request of the Supreme Court, the Chief Justice, the state court administrator, or the Attorney Grievance Commission.

(B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held. ~~If there is insufficient cause to warrant filing a complaint, the commission may:~~

~~(1) dismiss the matter,~~

~~(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct,~~

~~(3) dismiss the matter contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring,~~

~~(4) admonish the respondent, or~~

~~(5) recommend to the Supreme Court private censure, with a statement of reasons.~~

(C) Limitations period. Except when the commission determines otherwise for good cause, any complaint filed more than three years after the grievant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the commission. When the last episode of an alleged pattern of recurring judicial misconduct arises within the three-year period, the commission may consider all prior acts or omissions related to such an alleged pattern of conduct.

(~~C~~D) Adjourned Investigation. If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members present or participating by telephone or teleconference determine that the public interest and the interests of justice require otherwise.

~~(D) Notice to Judge.~~

~~(1) Before filing a complaint or taking action under subrule (B)(5), the commission must give written notice to the judge who is the subject of a request for investigation. The purpose of the notice is to afford the judge an opportunity to apprise the commission, in writing within 28 days, of such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant issues. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct.~~

~~(a) For good cause shown, the commission may grant a reasonable extension of the 28-day period.~~

~~(b) The Supreme Court may shorten the time periods prescribed in this and other provisions of this subchapter at its own initiative or at the request of the commission.~~

~~(2) Before taking action under subrule (B)(2)-(4), the commission must give written notice to the judge of the nature of the allegations in the request for investigation and afford the judge a reasonable opportunity to respond in writing.~~

~~(3) If a judge so requests in response to a written notice from the commission under this subrule, the commission may offer the judge an opportunity to appear informally before the commission to present such information as the judge may choose, including information about the factual aspects of the allegations and other relevant issues.~~

~~(4) On final disposition of a request for investigation without the filing of a formal complaint, the commission shall give written notice of the disposition to the judge who was the subject of the request. The~~

~~commission also shall provide written notice to the complainant that the matter has been resolved without the filing of a formal complaint.~~

~~(5) If the commission admonishes a judge pursuant to MCR 9.207(B)(4):~~

~~(a) The judge may file 24 copies of a petition for review in the Supreme Court, serve two copies on the commission, and file a proof of service with the commission within 28 days of the date of the admonishment. The petition for review, and any subsequent filings, shall be placed in a confidential file and shall not be made public unless ordered by the Court.~~

~~(b) The executive director may file a response with a proof of service on the judge within 14 days of receiving service of the petition for review.~~

~~(c) The Supreme Court shall review the admonishment in accordance with MCR 9.225. Any opinion or order entered pursuant to a petition for review under this subrule shall be published and shall have precedential value pursuant to MCR 7.317.~~

(E) Physical or Mental Examination. In the course of an investigation where a respondent's physical or mental condition is at issue, the commission may request the ~~judge~~respondent to submit to a physical or mental examination. Failure of the ~~judge~~respondent to submit to the examination may constitute judicial misconduct. MCR 2.311(B) is applicable to the examination. A respondent's unjustified failure to submit to a physical or mental examination requested by the commission may be considered as evidence of physical or mental disability, and the respondent shall be required to pay any costs incurred as a result of the respondent's failure to comply.

(F) Expediting Matters; Disposition Time frame.

(1) When the integrity of the judicial system requires, the Supreme Court may direct that the commission expedite its consideration of any investigation, and may set a deadline for the commission to submit any recommendation to the Court, notwithstanding any other provision in this subchapter.

(2) A complaint shall be dismissed if not disposed of by the commission as provided in these rules within 18 months after issuance of the complaint by the commission. The following periods are excluded in computing the time for disposition:

(a) All periods of delay granted at the request of the respondent from and to a date certain.

(b) All periods of time in which the respondent has concealed or conspired to conceal facts that would be evidence or could lead to evidence of any violation of the code of judicial conduct.

The dismissal of a complaint under this or any rule of the commission shall be an absolute bar to any subsequent filing of the complaint or any complaint that could have been joined with the complaint dismissed.

RULE ~~9.208~~9.221. EVIDENCE.

(A) Taking of Evidence During ~~Preliminary~~ Investigation. ~~Before filing a complaint, t~~The commission may take evidence before it or an individual member of the commission, or before the executive director or other member of the staff for purposes of the ~~preliminary~~ investigation.

(B) The commission may request that a respondent comment on any aspect of an investigation. The respondent shall have 21 days from the date of the request for comments to provide a response. The executive director may extend the response time for an additional 21 days. Any further request for additional time may only be granted by the commission or its chairperson for good cause shown. The respondent must sign the response, and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response. ~~Cooperation with Investigation. A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation.~~

~~(C) Discovery.~~

~~(1) Pretrial or discovery proceedings are not permitted, except as follows:~~

~~(a) At least 21 days before a scheduled public hearing,~~

~~(i) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, and~~

~~(ii) the commission shall make available to the respondent for inspection or copying all exculpatory material in its possession.~~

~~(b) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.~~

~~(2) A deposition may be taken of a witness who is living outside the state or who is physically unable to attend a hearing.~~

~~(3) The commission or the master may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.~~

~~If a party fails to comply with subrules (C)(1) or (2), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).~~

(C) Issuance of Subpoenas.

~~(1) Before the filing of a complaint, t~~The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the ~~preliminary~~ investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a ~~judge~~respondent under investigation.

~~(2) After the filing of a complaint, the commission may issue subpoenas either to secure evidence for testing before the hearing or for the attendance of witnesses and the production of documents or other tangible evidence at the hearing.~~

~~(B)~~(D) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR

2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

(E) Cooperation With Investigation. A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation. Failure to cooperate may be considered judicial misconduct or attorney misconduct. No court may charge the Judicial Tenure Commission for copying costs or certification costs, whether under MCL 600.2546 or otherwise, unless the Michigan Supreme Court specifically so authorizes

RULE ~~9.207 INVESTIGATION; NOTICE~~ 9.222. FURTHER INVESTIGATION; THE "28-DAY LETTER".

(A) Before filing a complaint ~~or taking action under subrule (B)(5),~~ the commission must give written notice to the ~~judge~~respondent who is the subject of a request for investigation. The purpose of the notice is to afford the ~~judge~~respondent an opportunity to apprise the commission, in writing within 28 days, of such matters as the ~~judge~~respondent may choose, including information about the factual aspects of the allegations and other relevant issues. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct. In addition, the request for investigation shall be attached, redacted to protect the grievant's identity. The respondent shall sign the response and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response.

(a) For good cause shown, the commission or its chairperson may grant a reasonable extension of the 28-day period.

(b) The Supreme Court may shorten the time periods prescribed in this and other provisions of this subchapter at its own initiative or at the request of the commission.

(B) In the commission's discretion, it may issue a "28-day letter" without having first requested the respondent's comments pursuant to MCR 9.221(B).

(C) The commission may continue to investigate until it issues a complaint, at which point the disciplinary counsel may continue investigating as needed.

(D) If a respondent ~~judge so~~ requests in response to a written notice from the commission under this ~~sub~~rule, the commission may offer the ~~judge~~ respondent an opportunity to appear informally before the commission to present such information as the ~~judge~~ respondent may choose, including information about the factual aspects of the allegations and other relevant issues.

RULE ~~9.207~~9.223. CONCLUSION OF INVESTIGATION; NOTICE.

(A) ~~(B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held.~~ If the commission determines at any time in the investigation that there ~~is~~ are insufficient ~~cause~~ grounds to warrant filing a complaint, the commission may:

(1) dismiss the matter,

(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct,

(3) dismiss the matter with or without a letter of explanation or caution that addresses the respondent's conduct contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring, or

(4) ~~admonish the respondent, or~~

~~(5)~~ recommend to the Supreme Court an admonishment or private censure, with a statement of reasons.

~~(D)~~(B) Notice to ~~Judge~~Respondent.

~~(2)~~ Before taking action under subrule ~~(B)(2)-(4)~~(A)(2)-(4), the commission must ~~give~~ first have given written notice to the ~~judge~~respondent of the nature of the allegations in the request for investigation and afford the ~~judge~~respondent a reasonable opportunity to respond in writing, pursuant to MCR 9.221(B), MCR 9.222(A), or both.

~~(5) If the commission admonishes a judge pursuant to MCR 9.207(B)(4):~~

~~(a) The judge may file 24 copies of a petition for review in the Supreme Court, serve two copies on the commission, and file a proof of service with the commission within 28 days of the date of the admonishment. The petition for review, and any subsequent filings, shall be placed in a confidential file and shall not be made public unless ordered by the Court.~~

~~(b) The executive director may file a response with a proof of service on the judge within 14 days of receiving service of the petition for review.~~

~~(c) The Supreme Court shall review the admonishment in accordance with MCR 9.225. Any opinion or order entered pursuant to a petition for review under this subrule shall be published and shall have precedential value pursuant to MCR 7.317.~~

~~(4)~~(C) On final disposition of a request for investigation without the filing of a ~~formal~~ complaint, the commission shall give written notice of the disposition to the ~~judge~~respondent who was the subject of the request. The commission also shall provide written notice to the ~~complainant~~grievant that the matter has been resolved without the filing of a ~~formal~~ complaint.

RULE 9.224. COMPLAINT.

(A) Upon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent.

(B) If the commission issues a complaint, it shall appoint the executive director or another attorney to act as disciplinary counsel. If the executive director assumes the role of disciplinary counsel, the commission shall appoint outside counsel to act as commission counsel. If the commission appoints outside counsel to act as disciplinary counsel, the executive director shall serve as commission counsel.

(C) Upon issuing a complaint, the commission shall petition the Court for the appointment of a master.

RULE ~~9.219~~9.225. INTERIM SUSPENSION.

(A) Petition.

(1) ~~After~~With the filing of a complaint ~~is filed~~, the commission may petition the Supreme Court for an order suspending a ~~judge~~respondent from acting as a judge until final adjudication of the complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a ~~judge~~respondent from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted. Conviction of a felony is grounds for automatic interim suspension, with or without pay, pending action by the commission. If the respondent is suspended without pay, the respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(3) Notwithstanding any other provision of this rule, in a matter in which a respondent is alleged to have misappropriated public funds, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge without pay in response to a request for investigation, pending a decision by the commission regarding the issuance of a complaint. The respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

(B) Contents; Affidavit or Transcript. The petition must be accompanied by a sworn affidavit or court transcript, and state facts in support of the allegations and the assertion that immediate suspension is necessary for the proper administration of justice.

(C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent, who may file an answer to the petition within 14 days after service of the petition, unless the commission has filed a motion for immediate consideration. The commission must be served with a copy of the answer.

RULE ~~9.209~~9.230. PLEADINGS.

Other than motions, ~~T~~the complaint and answer are the only pleadings allowed.

(A) Complaint.

(1) Filing; Service. A complaint may not be ~~filed~~issued before the completion of a preliminary investigation. Upon concluding that there is sufficient evidence to warrant the ~~filing~~issuance of a complaint, the commission shall direct the executive director or equivalent staff member to do the following:

(a) subject to MCR 9.261, enter the complaint in the commission docket, which is a public record;

(b) retain the complaint in the commission office; and

(c) promptly serve a copy of the complaint on the respondent.

(2) Form of Complaint. A complaint must be entitled: "Complaint Against _____, Judge. No. ____."

A complaint must be in form similar to a complaint filed in a civil action in the circuit court.

(B) Answer.

(1) Filing. Within 14 days after service of the complaint, the respondent must file with the commission the original and 9 copies of an answer verified by the respondent.

(2) Form. The answer must be in form similar to an answer in a civil action in the circuit court, and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent. ~~Wilful~~Willful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.

(3) Affirmative defenses, including the defense of laches, must be asserted in the answer or they will not be considered.

RULE ~~9.210~~9.231. ~~NOTICE OF PUBLIC HEARING;~~ APPOINTMENT OF MASTER ~~AND EXAMINERS~~; LIST OF PRIOR DISCIPLINARY ACTION.

(A) ~~Notice of Public Hearing. Upon the filing of a complaint, the commission must set a time and a place of hearing before the commission and notify the respondent at least 21 days in advance, or request in writing that the Supreme Court appoint a master to hold the hearing. Such a request must be accompanied by a copy of the complaint.~~

~~(B)~~ Appointment of Master.

(1) ~~If the commission requests that t~~The Supreme Court shall appoint a master to conduct the hearing~~, the Court shall do so~~ within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure.

(2) The master shall set a time and a place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing. Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.

(3) The master may conduct one or more pretrial conferences, and may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.

(4) Unless the parties agree to waive them, closing arguments at the hearing before the master shall be oral and take place upon conclusion of the presentation of evidence. The master may not adjourn or postpone closing arguments for the preparation of a transcript or the submission of proposed findings of fact.

~~(3)~~(5) MCR 2.003(B) shall govern all matters concerning the disqualification of a master.

(B) Prior or Pending Disciplinary Action. The parties shall submit a list of all pending or previous disciplinary action taken against the respondent, sufficient information to understand the context of the individual circumstances, and the disposition of each incident. For purposes of this rule, "disciplinary actions" includes any disposition other than a dismissal under MCR 9.223(A)(1), including nonsanctions under MCR 9.223(A)(2)-(4). The parties also shall include information about actions initiated against a respondent in proceedings other than disciplinary actions, including court cases for superintending control, criminal proceedings, internal discipline actions, or any other allegations of judicial misconduct. The list of previous disciplinary actions shall be submitted under seal, and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

~~(C) Appointment of Examiners. The executive director shall act as the examiner in a case in which a formal complaint is filed, unless the commission appoints another attorney to act as examiner.~~

RULE 9.232. DISCOVERY.

(1) Pretrial or discovery proceedings are not permitted, except as follows:

(a) At least 21 days before a scheduled public hearing,

(i) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, and

(ii) ~~the commission~~ disciplinary counsel shall make available to the respondent for inspection or copying all exculpatory material in its possession.

(b) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.

(2) A deposition may be taken of a witness who is living outside the state or who is ~~physically~~ unable to attend a hearing.

~~(3) The commission or the master may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.~~

If a party fails to comply with subrules ~~(C)~~(1) or (2), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

RULE ~~9.211~~9.233. PUBLIC HEARING.

(A) Procedure. The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. A respondent is entitled to be represented by an attorney. ~~The hearing must be held whether or not the respondent has filed an answer or appears at the hearing. The examiner~~ Disciplinary counsel shall present the evidence in support of the charges set forth in the complaint, and at all times shall have the burden of proving the allegations by a preponderance of the evidence. ~~A respondent is entitled to be represented by an attorney.~~ Any employee, officer, or agent of the respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the ~~examiner~~disciplinary counsel or by the ~~judge~~respondent, is subject to cross-examination by either party as an opposite party under MCL 600.2161.

(B) Effect of Failure to Comply.

(1) ~~The respondent's failure to answer or to appear at the hearing may not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for commission action.~~ If the respondent is in default for not having filed a timely answer, or fails to attend the proceedings without being excused by the master, the commission, or the court, the allegations set forth in the complaint shall be deemed admitted, taken as true, and may form the basis for the master to make findings of fact.

(2) The respondent's failure ~~to answer,~~ to testify in his or her own behalf~~;~~ or to submit to a medical examination requested by the commission or the master~~;~~ may be considered as an evidentiary fact, unless the failure was due to circumstances unrelated to the facts in issue at the hearing.

(C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means. ~~A separate record must be made i~~If the master ~~or the commission~~ declines to admit evidence, a separate record shall be made so that the commission and/or the court may consider that evidence and determine whether to include it in the record.

~~(D) Rulings. When the hearing is before the commission, at least 5 members must be present while the hearing is in active progress. Procedural and other interlocutory rulings must be made by the chairperson and are taken as consented to by the other members of the commission unless a member calls for a vote, in which event a ruling must be made by a majority vote of those present.~~

RULE ~~9.212~~9.234. SUBPOENAS.

(A) Issuance of Subpoenas.

~~(1) Before the filing of a complaint, the commission~~ The attorneys may issue subpoenas for the attendance of witnesses ~~to provide statements~~ or the production of ~~produce~~ documents or other tangible evidence ~~exclusively for consideration by the commission and its staff~~

~~during the preliminary investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a judge under investigation.~~

~~(2) After the filing of a complaint, the commission may issue subpoenas either to secure evidence for testing before the hearing or for the attendance of witnesses and the production of documents or other tangible evidence at the hearing.~~

(B) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

RULE ~~9.213~~9.235. AMENDMENTS OF COMPLAINT OR ANSWER.

The master, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments of the complaint or the answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment. A "28-day letter" is not required to amend a complaint.

RULE ~~9.214~~9.236. REPORT OF MASTER.

The court reporter shall prepare a transcript of the proceedings conducted before the master within 21 days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent's attorney) and disciplinary counsel, by e-mail. Within 21 days after a transcript of the proceedings is provided, the master shall prepare and transmit to the commission ~~in duplicate~~ a report that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. ~~The report must be accompanied by three copies of the transcript of the proceedings before the master.~~ On receiving the report ~~and the transcript~~, the commission must promptly send a copy ~~of each~~ to the respondent, unless the master has already done so.

RULE ~~9.215~~9.240. OBJECTIONS TO REPORT OF MASTER.

Within 28 days after ~~copies of~~ the master's report ~~and the transcript are~~ is mailed to the respondent, ~~the examiner~~ disciplinary counsel or the respondent may file with the commission an original and 9 copies of a brief in support of or in opposition to all or part of the master's report ~~of a statement of objections to the report of the master, along with a supporting brief~~. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the commission, are

limited to 50 pages in length. A copy of the ~~a statement and~~ brief must be served on the opposite party, who shall have 14 days to respond.

RULE ~~9.216~~9.241. APPEARANCE BEFORE COMMISSION.

When the ~~master files the report~~ hearing before the master has concluded, the commission shall set a date for hearing objections to the report. ~~The respondent and the examiner must file written briefs at least 7 days before the hearing date. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the Judicial Tenure Commission, are limited to 50 pages in length.~~ Both the respondent and the ~~examiner~~ disciplinary counsel may present oral argument at the hearing before the commission.

RULE ~~9.217~~9.242. EXTENSION OF TIME.

For good cause shown, t~~T~~he commission or its chairperson may extend for periods not to exceed 28 days the time for the filing of an answer, for the commencement of a hearing before the commission, for the filing of the master's report, and for the filing of a statement of objections to the report of a master. ~~A master may similarly extend the time for the commencement of a hearing.~~

RULE ~~9.218~~9.243. HEARING ADDITIONAL EVIDENCE.

The commission may order a hearing before itself or the master for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

RULE ~~9.220~~9.244. COMMISSION DECISION.

(A) Majority Decision.

(1) The affirmative vote of 5 commission members who have considered the report of the master and any objections, and who were present at an oral hearing provided for in MCR ~~9.216~~9.241, or have read the transcript of that hearing, is required for a recommendation of action with regard to a ~~judge~~respondent. A commissioner may file a written dissent.

~~(2) If the hearing was held without a master, the affirmative vote of 5 commission members who were present when the evidence was taken or who have read the transcript of that proceeding is required for such a recommendation. A commissioner may file a written dissent.~~

(2)~~(3)~~ It is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a ~~judge~~respondent, or on the specific action that is warranted, only that there was some conduct that warrants such a recommendation.

(B) Record of Decision.

(1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference. The commission's report must include a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(4) or MCR 9.224, and must include an acknowledg-

ment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal, and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent, and reasonably equivalent to the action that has been taken previously in equivalent cases.

~~(C) Action With Respondent's Consent. With the consent of the respondent and the commission, the Supreme Court may impose a sanction or take other action at any stage of the proceedings under these rules.~~

RULE 9.245. CONSENT AGREEMENTS.

(A) Action with Respondent's Consent. At any time, the respondent and the disciplinary counsel (or the executive director acting as the putative disciplinary counsel) may enter into confidential negotiations. A consent agreement may

(1) include stipulated facts and an agreement as to the sanction; or

(2) include just the stipulated facts, with no agreement as to the sanction.

The parties may present a signed consent agreement to the commission, which shall review the matter and decide whether to accept it. If the consent agreement is filed under subsection (1), the parties do not file briefs and the matter is not set on the docket for argument following the commission's decision, unless otherwise directed by the Court. If the consent agreement is filed under subsection (2), the matter proceeds pursuant MCR 9.250 and MCR 9.251.

(B) Commission Action. If the commission agrees to the terms set forth in the consent agreement in subsection (1), the commission shall issue a decision and recommendation as if there had been a master's report filed. If the commission agrees to the terms set forth in the consent agreement in subsection (2), the stipulated facts serve in lieu of a master's report, and the matter then proceeds to a hearing before the commission, with the briefing schedule and an appearance before the commission, as set forth in MCR 9.240 and MCR 9.241. The time for filing a brief before the commission in matters filed under subsection (2) shall start with the filing of the consent agreement. A copy of the consent agreement shall be attached to the commission's decision. The commission's recommendation must include its rationale for accepting the consent agreement as well as a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(4) or MCR 9.224, and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action.

(C) Prior or pending discipline actions. As part of a proposed consent agreement, the parties shall submit a list of all pending or previous disciplinary action taken against the respondent, sufficient information to understand the context of the individual circumstances, and the

disposition of each incident. For purposes of this rule, "disciplinary actions" includes any disposition other than a dismissal under MCR 9.223(A)(1), including nonsanctions under MCR 9.223(A)(2)-(4). The parties also shall include information about actions initiated against the respondent in proceedings other than disciplinary actions, including court cases for superintending control, criminal proceedings, internal discipline actions, or any other allegations of judicial misconduct. The list of previous disciplinary actions shall be submitted under seal, and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

~~(C)~~(D) Supreme Court Action.~~Action With Respondent's Consent. With the consent of the respondent and the commission,~~ The Supreme Court may impose a sanction or take other action at any stage of the proceedings under these rules.

(E) Confidentiality. A consent agreement submitted to the commission shall not be made public until after the commission has accepted its terms and the Court has approved it.

RULE 9.246. COSTS AND SANCTIONS.

(A) Generally. In its decision, the commission shall include a provision addressing the payment of costs, which shall be reviewable by the Court. Reimbursement of costs is a condition for the termination of any period of suspension ordered by the Court. If a respondent resigns before the commission has issued its decision, the commission may nonetheless recommend the payment of costs.

(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include basic administrative costs and may include, if appropriate, actual expenses incurred by the commission and/or a master for the expenses after the issuance of a complaint.

(1) Basic Administrative Costs:

(a) for discipline imposed pursuant to consent under MCR 9.245, $750;

(b) for discipline imposed under MCR 9.244, $1,500;

(2) In addition to costs imposed under subsection (B)(1), a respondent may be ordered to pay the actual costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the respondent engaged in conduct involving fraud or deceit, or intentional misrepresentation to the commission, the commission's investigators, the master, or the Supreme Court. For purposes of determining the actual costs, fees, and expenses to be paid under this provision, the disciplinary counsel shall file with the commission an itemized statement of the actual expenses of the hearing, including but not limited to witness fees, witness travel and lodging expenses, expert witness fees, and the fee for the master's services and any related expenses of the master. Copies shall be served upon the respondent. The itemized statement of the expenses shall be a part of the commission's decision.

(C) Certification of Nonpayment. If the Court orders the respondent to pay costs, and the respondent fails to do so within the time prescribed by the Court, the executive director shall serve a certification of the

nonpayment upon the respondent and file a copy in the Court. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.

(D) Suspension for Nonpayment. In addition to the interest provided for above, the Court may further suspend the respondent from acting as a judge until the reimbursement is paid. If the discipline imposed was a public censure without a period of suspension, the Court may then suspend the respondent from acting as a judge until the reimbursement is paid.

RULE ~~9.223~~9.250. FILING AND SERVICE OF DOCUMENTS ~~BY~~AFTER COMMISSION'S DECISION.

(A) Within 21 days after issuing its decision and recommendation, the ~~entering an order recommending action with regard to a respondent, the commission must take the action required by subrules (A) and (B).~~

~~(A) Filings in Supreme Court. The~~ commission must file in the Supreme Court:

(1) the original record arranged in chronological order and indexed and certified;

(2) 24 copies of the order; and

(3) a proof of service on the respondent.

(B) ~~Service on Respondent.~~ The commission must serve the respondent with:

(1) notice of the filing under MCR 9.223(A)(1);

(2) 2 copies of the order;

(3) 2 copies of the index to the original record; and

(4) a copy of a portion of the original record not submitted by or previously furnished to the respondent.

If the commission files electronically, then the applicable court rules governing electronic filing apply.

RULE ~~9.224~~9.251. REVIEW BY SUPREME COURT.

(A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court 24 copies of

(1) a petition to reject or modify the commission's recommendation, which must:

(a) be based on the record,

(b) specify the grounds relied on,

(c) be verified, and

(d) include a brief in support; and

(2) an appendix presenting portions of the record that the respondent believes necessary to fairly judge the issues.

The respondent must serve the commission with ~~3~~ one copy~~ies~~ of the petition and ~~2~~ one copy~~ies~~ of the appendix and file proof of that service. If the respondent files electronically, then the applicable rules governing electronic filing apply.

(B) Role of Disciplinary Counsel. If a respondent submits a petition under subsection (A), disciplinary counsel shall appear on behalf of the commission and advocate only for the position recommended by the commission.

~~(B)~~(C) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file

(1) 24 copies of a reply brief ~~supporting its finding~~, and

(2) proof that the respondent was served with ~~2~~ one copy~~ies~~ of the brief.

The commission may file 24 copies of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues. If the disciplinary counsel files electronically, then the applicable rules governing electronic filing apply.

~~(C)~~(D) Review in Absence of Petition by Respondent. If the respondent does not file a petition, the Supreme Court will review the commission's recommendation on the record filed. The Supreme Court may order that briefs be filed or arguments be presented.

~~(D)~~(E) Form of Briefs. A brief filed under this subrule is to be similar to a brief filed in an appeal to the Supreme Court.

~~(E)~~(F) Additional Evidence. The Supreme Court may, if cause is shown, order that further evidence be taken and added to the original record.

~~(F)~~(G) Submission. The clerk will place the case on a session calendar under MCR ~~7.312~~7.313. Oral argument may be requested.

RULE ~~9.225~~9.252. DECISION BY SUPREME COURT.

(A) The Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction. When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication. If the Court removes a judge from office, it shall refer the matter to the Attorney Grievance Commission. The Attorney Grievance Commission shall investigate and may file recommendations with the Court for imposing lawyer sanctions. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(B) If the commission issues a decision based on a consent agreement between the respondent and the disciplinary counsel ~~commission have consented to a course of action~~ under subrule ~~9.220(C)~~9.245(A)(1) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent shall be afforded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

RULE ~~9.226~~9.253. MOTION FOR REHEARING.

Unless the Supreme Court directs otherwise, the respondent may file a motion for rehearing within 14 days after the filing of the decision. If

the Supreme Court directs in the decision that a motion for rehearing may not be filed, the decision is final on filing.

RULE ~~9.206~~9.260. SERVICE.

(A) ~~Judge~~Respondent. When provision is made under these rules for serving a complaint or other document on a ~~judge~~respondent, the service must be made in person or by registered or certified mail or through an overnight delivery service to the ~~judge's~~respondent's judicial office or last known residence. If an attorney has appeared for a ~~judge~~respondent, service may be on the attorney in lieu of service on the ~~judge~~respondent.

(B) Commission. Service on the commission must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the executive director at the commission's office.

(C) Disciplinary Counsel. Service on the disciplinary counsel must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the disciplinary counsel at that individual's address on record with the state bar.

(D) Alternative Service. The respondent, the respondent's attorney, the executive director, disciplinary counsel, and/or commission counsel, may serve one another via e-mail with a paper copy being sent via regular mail to the individual's address on record with the state bar.

RULE ~~9.221~~9.261. CONFIDENTIALITY; DISCLOSURE.

(A) Scope of Rule. Except as provided in this rule, all papers filed with the commission and all proceedings before it are confidential in nature and are absolutely privileged from disclosure by the commission or its staff, including former members and employees, in any other matter, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. Nothing in this rule prohibits the respondent ~~judge~~ from making statements regarding the ~~judge's~~respondent's conduct.

(B) Before Filing a ~~Formal~~ Complaint.

(1) Before a complaint is filed, neither a commissioner nor a member of the commission staff may disclose the existence or contents of an investigation, testimony taken, or papers filed in it, except as needed for investigative purposes.

(2) The commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to statements

(a) that there is an investigation pending,

(b) that the investigation is complete and there is insufficient evidence for the commission to file a complaint, or

(c) with the consent of the respondent, that the investigation is complete and some specified disciplinary action has been taken.

(C) Discretionary Waiver of Confidentiality or Privilege. The commission may waive the confidentiality or privilege protections if:

(1) the respondent waives, in writing, the right to confidentiality or privilege;

(2) the grievant waives, in writing, the right to confidentiality or privilege;

(3) the witness whose statement, testimony, or other evidentiary item will be disclosed waives, in writing, the right to confidentiality or privilege; and

(4) a majority of the commission determines that the public interest will be served by doing so.

(D) After Filing of ~~Formal~~ Complaint.

(1) ~~When the commission issues a complaint~~After a complaint has been filed and an answer has been filed in response (or the time for filing an answer has elapsed), the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the master or commission, and the public hearing provided for in MCR ~~9.216~~9.241.

(2) This subrule neither limits nor expands a respondent's right to discovery under MCR ~~9.208(C)~~9.232.

(3) The confidentiality or privilege of any otherwise nonpublic disciplinary action is waived in any proceeding on a concurrent or subsequent ~~formal~~ complaint.

(E) Disclosure to Grievant.

(1) Upon completion of an investigation or proceeding on a complaint, the commission shall disclose to the grievant that the commission

(a) has found no basis for action against the ~~judge~~respondent or determined not to proceed further in the matter,

(b) has taken an appropriate corrective action, the nature of which shall not be disclosed, or

(c) has recommended that the respondent be publicly censured, suspended, removed, or retired from office.

(F) Public Safety Exception. When the commission receives information concerning a threat to the safety of any person or persons, information concerning such person may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement or any appropriate prosecutorial agency.

(G) Disclosure to State Court Administrator.

(1) The commission may refer to the state court administrator requests for investigation and other communications received by the commission concerning the conduct of a judge if, in the opinion of the commission, the communications are properly within the scope of the duties of the administrator. The commission may provide the adminis-

trator with files, records, investigations, and reports of the commission relating to the matter. Such a referral does not preclude action by the commission if the judge's conduct is of such a nature as to constitute grounds for action by the commission, or cannot be adequately resolved or corrected by action of the administrator.

(2) The commission may disclose to the administrator, upon request, the substance of files and records of the commission concerning a former judge who has been or may be assigned judicial duties by the administrator; a copy of the information disclosed must be furnished to the judge.

(H) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, either the Attorney Grievance Commission or the Judicial Tenure Commission may petition the Supreme Court for an order resolving the dispute.

(I) Disclosure to Chief Judge. Notwithstanding the prohibition against disclosure in this rule, and except for those situations that involve a dismissal with explanation, the commission shall notify the chief judge of a court when the commission has taken action under MCR ~~9.207(B)(2)-(5)~~9.223(A)(2)-(4) involving a magistrate or referee of that court. Upon the chief judge's request, the referee or magistrate shall provide the chief judge with a copy of the commission's written notice of disposition.

RULE ~~9.222~~9.262. RECORD RETENTION.

The commission shall develop a record-retention policy, which shall include a description of the materials that are to be stored, a list of the time for which specific materials must be maintained, and procedures for the disposal of records.

RULE ~~9.227~~9.263. IMMUNITY.

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, its employees, or its agents, or given in an investigation or proceeding on allegations regarding a ~~judge~~respondent, and no civil action predicated upon the statements or communications may be instituted against a grievant-~~complainant~~, a witness, or ~~their~~his or her counsel. Members of the commission and their employees and agents, masters, disciplinary counsel, and commission counsel~~examiners~~ are absolutely immune from civil suit for all conduct in the course of their official duties.

RULE ~~9.228~~9.264. ETHICS MATERIALS AND PROGRAMS.

The commission shall work with other groups and organizations, including the State Bar of Michigan, to develop educational materials and programs that are designed to assist judges in maintaining an awareness and understanding of their ethical obligations.

Staff Comment: The proposed amendments of MCR 9.200 *et seq.* were submitted to the Court by the Judicial Tenure Commission to rearrange and renumber the rules applicable to the JTC to provide clarity and facilitate navigation. The proposed amendments of the JTC also include new rules and revisions of current rules regarding costs and sanctions, as well as other substantive proposed changes. This proposal includes most of the revisions suggested by the JTC, as well as some additional substantive changes added by the Court for purposes of public comment.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by December 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-14. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.